THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XV.

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AMERICAN STATE REPORTS.

VOL. XV.

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AMERICAN STATE REPORTS.

VOL. XV.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

In the Matter of the Estate of Elizabeth D. Traylor, Deceased.

[81 California, 9.]

Devise Void for Uncertainty. — A provision in a will requiring the executor to purchase, at a price not exceeding $——, a tract of land at or near the residence of certain persons named, at a certain town, for a cattle pasture, the free and exclusive use of which said persons shall have during their lifetime and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter, is void for vagueness and uncertainty.

Appeal from a decree distributing the estate of a deceased person. The opinion states the case.

Selden S. and George T. Wright, and Harmon Bell, for the appellants.

D. William Douthitt, for the respondent.

McFarland, J. This is an appeal taken by Joseph and Margaret Wilson and Kitty Bell from a judgment of the court below construing the will of the deceased, and ordering a distribution of the residue of the estate to the heir at law. The only point made by appellants is, that the court erred in holding void for vagueness and uncertainty the following clause of the will: —

"I also require my said executors to purchase, at a price not exceeding $——, a tract of land at or near the residence of said Wilsons at Santa Barbara for a cattle pasture, the free

and exclusive use of which the said Wilsons shall have during their lifetime and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter, Kitty Bell."

We think that the judgment of the superior court was right. Counsel for appellants argue the case, mainly, as if the only question were, Did the failure to state the amount to be expended render the devise void? But that is only half of the problem. If there had been any certainty in the description, or, indeed, any description at all, of the land directed to be purchased, it may be that the will should have been construed as directing the purchase of the land described, no matter what it might cost. But when we go from the blank dollar-mark to look for a description of the land, we come upon another blank as empty as the first. There is no description, either by common name, or by metes and bounds, or by quantity, or by any other sort of designation by which any particular piece of land can be indicated. The case is very different from the cases cited where bequests for the education or support, or maintenance, etc., of infants and others, without specifying the amounts to be used for such purposes, have been maintained. In such instances, the amount necessary for the purpose, considering the station in life of the legatee, and the condition of the estate, can readily be ascertained with reasonable certainty. But in the case at bar there is no path that will lead the inquirer out of the labyrinth.

Judgment affirmed.

BEQUESTS VOID FOR UNCERTAINTY. — For instances of bequests held void for uncertainty and indefiniteness: Note to *Mills* v. *Newberry*, 54 Am. Rep. 222; compare *Bridges* v. *Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94, and note, upon the general subject of bequests void for uncertainty. Where the provisions of a will in all its items, considered as an entirety, are so obscure that with the aid of all the light that can be shed upon it by extraneous circumstances, no definite idea can be formed of the intention of the testator in any of the dispositions he has attempted to make, it should be held void for uncertainty: *Cope* v. *Cope*, 45 Ohio St. 464.

O'HANLON *v.* DENVIR.

[81 CALIFORNIA, 60.]

NON-PAYMENT, SUFFICIENT ALLEGATION OF. — An allegation in a complaint in an action to recover money alleged to be due on a contract, that "the defendant, although thereto often requested by plaintiff, has failed, neglected, and refused to pay" the money, or any part thereof, is a sufficient allegation of non-payment.

PUBLIC LANDS MAY BE CLEARED FOR CULTIVATION BY PERSON IN POSSESSION. A person in possession of public lands of the United States has a right to clear them of scrub-oaks and other wild shrubbery, for the purpose of preparing them for cultivation.

IMPROVEMENTS ON PUBLIC LANDS OF THE UNITED STATES MAY BE SOLD by one in the mere possession thereof, and will constitute a good consideration for the promise of the buyer to pay the price agreed upon.

ACTION to recover money due on a contract. The opinion states the case.

B. B. Newman and William Rix, for the appellant.

William H. Fifield, for the respondent.

BELCHER, C. C. The only question presented by this case is, whether the complaint stated a cause of action when tested by a general demurrer. The court below held that it did not, and gave judgment for defendant, from which the plaintiff has appealed. The facts stated in the complaint are in substance as follows: The plaintiff and defendant were "in the actual possession as joint owners and tenants in common of all the possessory rights and improvements upon" certain lands described by legal subdivisions according to the government surveys. The improvements consisted of "dwelling-houses, the clearing of a portion of the land of scrub-oaks and other wild shrubbery, constructing roads leading to and upon the land, planting grave-vines thereon, and other improvements, all of which were made by plaintiff and defendant as such joint owners and tenants in common." While the parties were such owners, and so in possession of the premises, they mutually agreed that plaintiff should, and he did, "relinquish, sell, and assign to defendant all his right, title, and interest in and to said possessory claims, possession, and improvements"; and in consideration therefor the defendant agreed to pay plaintiff, on demand, the several sums of money expended by him in making the improvements, etc., and also the reasonable value of his work, labor, and services. It was agreed between the parties that the sums of money so

expended amounted to $632, and the alleged value of the labor and services was $325; but "the defendant, although thereto often requested by plaintiff, has failed, neglected, and refused to pay" these sums of money, or any part thereof.

It is argued for respondent that the demurrer was properly sustained, because the complaint contained no sufficient averment of non-payment, and in support of this position *Scroufe* v. *Clay*, 71 Cal. 123, is cited. That was an action on a promissory note, and the averment was that the defendant "has refused, and still refuses, to pay," etc. The complaint was demurred to on the ground that there was no allegation of non-payment, and the demurrer was overruled. It was held in this court that the demurrer should have been sustained; the court saying: "The averments of the complaint are not equivalent to an averment of non-payment. The failure to pay constitutes the breach, and must be alleged." We do not think that case at all in point for respondent. Here it is not only alleged that defendant had refused to pay, but that he had failed and neglected to do so. This was a direct allegation of "the failure to pay," and was clearly sufficient.

It is also urged that the lands described must be presumed to be public lands of the United States, because the complaint speaks of possessory rights upon them. And this being so, it is said that "the clearing of a portion of the land of scrub-oaks" was illegal, and the defendant's promise to pay for either the timber or the labor and money expended in doing this illegal act was void; citing *Ladda* v. *Hawley*, 57 Cal. 51, and *Swanger* v. *Mayberry*, 59 Id. 91. We do not see that any necessary presumption arises that the lands were public lands. One may have "possessory rights" to land the title of which has passed from the government. But conceding that the respondent is right in his assumption, still the cases cited only hold that one is not permitted to cut or sell the timber growing upon public land, but he may "occupy, settle upon, and use the land for the purpose of settlement, which would, of course, include the right of clearing away the timber for the purpose of cultivation or occupation." Now, scrub-oaks can hardly be said to be the timber which the government forbids any one to cut and sell from its lands. Some of the meanings of the word "scrub," as defined by Webster, are: "Something small and mean"; "close, low growth of bushes; low underwood"; "mean; dirty; contemptible; scrubby." It would seem, therefore, that when the plaintiff and defendant

cleared a portion of the land of scrub-oaks and other wild shrubbery, they were preparing the land for the purpose of planting grape-vines thereon, or other cultivation, and were doing nothing more than they were authorized to do.

It is further claimed that an agreement to sell a "possessory right" to public lands prior to entry and payment is void, and that by removing from the land described plaintiff relinquished to the government all his rights to it, including his improvements; that there was therefore no consideration for defendant's promise to pay. Counsel cite, in support of this position, *Damrell* v. *Meyer*, 40 Cal. 166, and *Huston* v. *Walker*, 47 Id. 484. These cases decide that an agreement by a pre-emptioner upon public land, prior to entry and payment, to sell the land to or divide it with another, after he shall have obtained title, is void. The decisions are undoubtedly correct, but no such question arises here. The single question presented here is, Can one who has made improvements on land, admitting it to be public land, sell his improvements to another? and does the sale constitute a good consideration for a promise to pay the agreed price? We know of no law, federal or state, forbidding such a sale, and of no decision by any court upholding respondent's theory. We conclude, therefore, that the demurrer was improperly sustained, and we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

GIBSON, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

IMPROVEMENTS UPON PUBLIC LANDS are recognized as the property of him who made them, and are subject to execution against him, or may be sold by him at a voluntary sale: *Bryan* v. *Glass*, 6 La. Ann. 740; 54 Am. Dec. 576, and particularly cases cited in the note. But in *Gibson* v. *Hutchins*, 12 La. Ann. 545, 68 Am. Dec. 772, it was decided that a mere settler upon public lands, even with hope of pre-emption, is merely a tenant at sufferance until he makes his entry; and if he makes improvements they are made at his own risk. So in *Labish* v. *Hardy*, 77 Cal. 327, it was held that a bare occupancy of public lands did not vest in the occupant any rights or equities in the land as against a subsequent grant not based upon such occupancy.

[IN BANK.]

PEOPLE *v.* REED.

[81 CALIFORNIA, 70.]

ARGUMENTATIVE FINDING OF DEDICATION OF STREET WILL NOT SUPPORT JUDGMENT WHEN. — Where the court finds generally in favor of the dedication of a street from the acts, facts, and matters before specifically found, and expressly and entirely as a conclusion therefrom, but the specific facts so found do not support such general conclusion, the judgment should be reversed.

MERE MARKING OF STREET ON UNRECORDED MAP DOES NOT CONSTITUTE DEDICATION WHEN. — The mere marking of a street on an unrecorded map of a town or city plat will not constitute a dedication of the street to the public by the owner, if the street is not actually opened, no sale of lots is made thereon, and the property remains inclosed and occupied by substantial and permanent buildings for more than twenty years before any action is taken by the municipal authorities to declare the street dedicated to the use of the public.

MAKING AND FILING OF MAP DESIGNATING STREETS IS ONLY OFFER TO DEDICATE THEM. — The making and filing of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and the dedication does not become effectual and irrevocable until the same is accepted by the public, either by user or some formal act of acceptance. But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the public, but the filing of it; and where the right of the public to claim the street rests upon the map alone, there is no offer to be accepted until the map is filed for record.

RIGHT OF PRIVATE INDIVIDUAL TO COMPEL OPENING OF STREET SHOWN ON MAP. — The right of private individuals, who have purchased property on the faith of a map designating streets therein, to compel the opening of the streets, depends solely upon the ground of estoppel, resting upon the representations whereby they have been induced to purchase on the faith of the implied statement that the designated streets were to be and remain open for public use. Purchasers who show that they acted on such representations may compel the opening of the streets, but if they do not, the public have no ground of complaint, where no offer of dedication has been made by the owner.

OWNER OF LAND MAY WITHDRAW OFFER OF DEDICATION THEREOF to the public as a street at any time before his offer is accepted. The mere making of sales of lots with reference to a map designating certain streets does not, therefore, constitute an irrevocable dedication to the public. As between him and the public, his act alone is not sufficient to constitute an irrevocable dedication.

ACCEPTANCE OF OFFER OF DEDICATION OF STREET MUST BE MADE WITHIN REASONABLE TIME. — The acceptance of an offer of the dedication of a street must be made either by user or by some formal act of acceptance within a reasonable time. An acceptance made more than twenty years after the offer of dedication is too late.

ACTION to declare a certain strip of land a public street. The opinion states the case.

William Matthews, for the appellants.

G. A. Johnson, attorney-general, and D. W. Herrington, for the respondent.

WORKS, J. This action was brought by the people on the relation of the mayor of the city of San José against the appellants, to declare a certain strip of land to be a public street of said city, to compel the appellants to remove certain buildings therefrom, and to enjoin them from maintaining said obstructions, and from setting up any claim of right to maintain the same thereon.

There was a judgment in favor of the plaintiff in the court below, and the defendants have appealed on the judgment roll.

The sole question in the case is, whether this strip of land had or had not been dedicated by the defendants, or either of them, to the public as a highway; and this question we are called upon to determine from the facts as they appear in the findings.

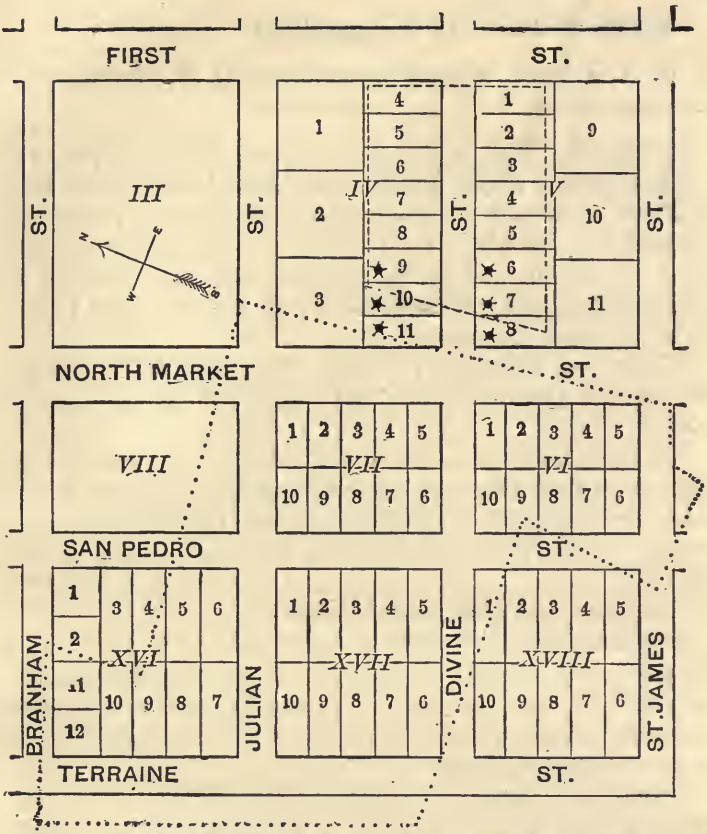
On this question the court finds:—

"6. That in March, 1862, the defendant E. P. Reed was the owner in fee of the lands, and the title thereto, designated by the red and blue lines shown on the map, marked 'Exhibit A,' city of San José, a copy of which is hereto attached and made a part of these findings.

"7. That in March of said year 1862, said defendant E. P. Reed caused said lands within said red and blue lines to be surveyed by Charles T. Healey, who was then the city surveyor of said city of San José, and, with the other lands indicated upon said map, to be subdivided and platted into streets, lots, and blocks, and a map thereof to be made upon a scale of two hundred feet to the inch, and of which said exhibit thereto attached is a true copy.

"8. That upon said survey and map the street designated Divine Street thereon was laid down as a thoroughfare and street, marked thereon 'Divine Street,' extending from the west line of First Street, as shown on said map, to the east line of Terraine Street, extending in length from First Street, westerly, a distance of 1,050, and being 60 feet in breadth throughout."

So much of the map as includes the lands referred to in said findings as being included within the red and blue lines is as follows:-



NOTE. — In the above diagram the red line is represented by dots, and the blue line by short dashes.

The whole length of Divine Street, as delineated on the map, appears on the part we have set out. The particular part of said street sought by this action to be opened lies between blocks VI. and VII., and extends from San Pedro to Market Street, a distance of one block.

The court further finds that said map was never recorded, but about twenty-five copies thereof were lithographed in said year 1862, and were by the appellant E. P. Reed exhibited to divers persons interested in the sale or purchase, or in some way connected with the transfers, of lands and lots in said city within the boundaries of the map, but gave instructions that the same should not be recorded; that the lands included in said map outside of the red and blue lines were the property of others than the said Reed, and their consent was not,

and could not be, obtained to the subdivision and mapping of the same, and had not since been obtained, except that persons owning Divine Street east of Market and west of San Pedro Street threw the same open to public use according to said survey and map, and those interested in that portion of San Pedro Street from Dame Street southerly to San Augustine Street, and that portion of Market Street deeded to the city of San José, were thrown open to the public use as streets in conformity to the map, and have ever since been and yet remain public streets under the charge of said city; "that in the year 1863, with the consent of said E. P. Reed and others interested as owners in the lands, and by and with the consent of the mayor and common council of said city, the course and direction of said North Market Street was changed from the direction indicated by the space lying between lands surrounded by the red lines and land surrounded by the blue lines on exhibit A, to conform said Market Street to said survey and map, and plan of streets, lots, and blocks as surveyed by said Healey, and the same has ever since continued to be the established route and direction of said Market Street; "that First and Julian streets, as laid down on said map, were established, open, public streets of said city for more than two years prior to said survey and mapping of said lands of defendant E. P. Reed; that all other streets shown upon said exhibit were for the first time designated as streets when said survey and map were made, as set forth in finding 11; that Market Street was changed as to direction; that Julian Street did not extend west of Market Street."

The court further finds that the appellant E. P. Reed, after the making of said map, made various conveyances and leases of property, describing the same by reference to said map, describing it. Some of these conveyances were by reference to lots and blocks, but most of them were by metes and bounds, ignoring the lots, blocks, and streets; some of them were by metes and bounds, designating some of the streets as the boundary lines, and some of them conveyed parts of the streets as laid out in the map. Some, if not the most, of these conveyances seem to have been of property of which he had no title, but were included in the map. These conveyances included lots 9, 10, and 11 of block IV., and lot 8 of block V., all of which fronted on the street in controversy in this action, but not on that part of the street sought to be opened.

The court further finds that on the twenty-fourth day of December, 1867, the appellant E. P. Reed conveyed to his wife, Clarissa M. Reed, by metes and bounds, all of blocks VI. and VII., and that part of Divine Street lying between said blocks, which is the portion of said street in controversy in this action; that thereafter certain other conveyances were made by Reed and wife by metes and bounds, mentioning certain of the streets on said map as boundary lines, one of which was for a part of said block VI., but not bordering on the street in controversy, the title to said portion of Divine Street and the lands bordering thereon still remaining in Mrs. Reed until her death, and being by her will devised to her husband.

The court further finds that on the twelfth day of December, 1884, more than twenty years after said map was made, and after the portion of the alleged street in controversy had been conveyed to Mrs. Reed, and had been occupied by buildings and fences, the mayor and common council of said city of San José passed an ordinance declaring that the strip of land in controversy "be and the same is hereby dedicated and set apart to public use as a public street forever," and instructing the street commissioner to demand possession thereof, and if possession was given, to remove all obstructions therefrom, and throw the same open to public use as a street of said city, and directing the city attorney, if possession were refused, to institute proceedings to recover the same for the city as a public street.

It is also found that the owners of said strip of land claimed to be the owners thereof, free from any claim of the city or any of its inhabitants to use the same as a street.

In conclusion, the court below finds as follows: —

"36. That by the acts, facts, and matters above found and recited, said premises above referred to and described were by said several parties dedicated as public streets of the city of San José, and were by the proper authorities of the city of San José accepted and received and used as public streets of the city of San José."

From the findings of fact the court concluded that the property in controversy had been dedicated as and was a public street of said city, and entered judgment accordingly.

This action was heard by this court, and decided in favor of the appellants, on the ground that the facts found by the court did not show a dedication: *People* v. *Reed*, Sup. Ct. Cal., December, 1888. A rehearing was granted. In their petition

for a rehearing, it was urged upon us that we had overlooked or had not given sufficient weight to the thirty-sixth finding, which they claimed was a finding of the ultimate fact of dedication, and concluded the case on this appeal against the appellant, the appeal being on the judgment roll. And they now attempt to forestall any inquiry into the question whether the specific facts found constituted a dedication of the property in controversy as a street by the same contention. But conceding that the finding is one of fact, or, as counsel terms it, a "conclusion of fact," it is apparent that the court below did not intend to cut off the right of the appellant to test the sufficiency of the specific facts found to show such dedication in the manner indicated. This finding is based upon the other facts found. It recites in terms that "by the acts, facts, and matters above found, said premises were by said parties dedicated," etc. It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed.

We pass, therefore, to a consideration of the question, whether the facts found show a dedication. In doing so, it must be borne in mind that the map made of the property was never recorded; that the part of the alleged street in controversy was never opened as a street, but for many years had been fenced and occupied by substantial and permanent buildings; that no sales of lots thereon were ever made; that there is no finding that any of the individuals who purchased property on other parts of the alleged street had ever seen the map of the property, or had any information at the time they purchased that a street was laid out at the place in controversy, and that no action was ever taken by the city for more than twenty years after the map was made, and the property inclosed and permanently improved.

In an early case this court said: "In dedication, no particular formality is necessary. It is not affected by the stat

ute of frauds. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient; the dedication being proved in most, if not all, of the cases by matter *in pais*, and not by deed. The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete,—precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway": *Harding* v. *Jasper*, 14 Cal. 647.

It is well settled by the decisions of this court that the making and filing of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and that the dedication does not become effectual and irrevocable until the same is accepted by the public: *Hayward* v. *Manzer*, 70 Cal. 476; *Harding* v. *Jasper*, 14 Id. 647; *San Francisco* v. *Calderwood*, 31 Id. 588; 91 Am. Dec. 542; *San Francisco* v. *Canavan*, 42 Cal. 552; *People* v. *Williams*, 64 Id. 502.

But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the public, but the filing; and where the right to claim the street by the public rests upon the map alone, there is no offer to be accepted until the same is filed for record.

It may be otherwise with private individuals who have purchased some of the property on the faith of the map designating the streets, but this must be solely on the ground of estoppel, resting upon the representations made whereby parties have been induced to purchase on the faith of the implied statement that the designated streets were to be and remain open for public use. Such individual purchasers may, if it be shown that they acted on such representations, compel the

opening of the streets, but if they do not, the public has no ground of complaint. No dedication or offer of dedication has been made to the public, and it is not an interested party.

It is conceded by counsel for respondent that the portion of the street in controversy "has never been opened as a street," and that "on it the defendant had maintained a barn and shed and kept it inclosed with substantial fences for more than twenty years before this suit." They take the position, however, that where the owner surveys and plats his property, and makes sales of lots with reference to such plat, the streets designated thereon are irrevocably dedicated to the public as streets. There are authorities sustaining this position: *Bartlett* v. *Bangor*, 67 Me. 464; *Carter* v. *City of Portland*, 4 Or. 339; *Stone* v. *Brooks*, 35 Cal. 494; *Grogan* v. *Hayward*, 6 Saw. 498; Dillon on Municipal Corporations, 3d ed., sec. 640.

But it is manifest that no such rule can prevail in this state, where it has been uniformly held that the owner may, at any time before his offer of dedication is accepted by the public, withdraw the same. As between him and the public, therefore, his act alone is not sufficient to constitute an irrevocable dedication. As we have said, it may be different as between him and private individuals to whom he has made sales of property with reference to the map. Much of the confusion in the decided cases has, in our judgment, grown out of the failure to distinguish between the right of the public authorities to claim a dedication and the right of a purchaser to compel the opening of a street on the ground of estoppel: *Holdane* v. *Trustees etc.*, 21 N. Y. 474; *Child* v. *Chappel*, 9 Id. 257. In the case of *Grogan* v. *Hayward*, 6 Saw. 498, relied upon by respondent, which was an action by a private individual, this distinction is clearly made. If the purchaser of property asserts his rights, the result may be the same, as to the mere keeping open of the street, as if a dedication is claimed by the public; but it does not follow that if he waives his right, the public can assert it, nor can the purchaser, by asserting his right to an open way, impose on the public the duty of keeping a street in repair that has never been accepted.

The case of *San Leandro* v. *Le Breton*, 72 Cal. 172, seems to overlook this plain distinction between the right of a purchaser and the public, but there it appeared that there was an acceptance by the public authorities, so that, so far as the opinion can be construed as militating against the rule above laid down, it is a mere *dictum*, and should have no weight.

Therefore, conceding that a platting of property and sale of lots constitutes a dedication, as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city, the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance: *Harding* v. *Jasper*, 14 Cal. 647; *Hayward* v. *Manzer*, 70 Id. 476; *San Francisco* v. *Calderwood*, 31 Id. 588; 91 Am. Dec. 542; *San Francisco* v. *Canavan*, 42 Cal. 552; *People* v. *Williams*, 64 Id. 502; *City of Galveston* v. *Williams*, 69 Tex. 449; *State* v. *Trask*, 6 Vt. 355; 27 Am. Dec. 554, 563; *Gilder* v. *City of Brenham*, 67 Tex. 345; *Cook* v. *Harris*, 61 N. Y. 448; *Briel* v. *City of Natchez*, 48 Miss. 423; *Field* v. *Manchester*, 32 Mich. 279; *Hamilton* v. *Chicago etc. R. R. Co.*, 124 Ill. 235; *Fisk* v. *Town of Havana*, 88 Id. 208. Numerous other cases to the same effect might be cited.

Such acceptance must be within a reasonable time after such offer of dedication, and if not accepted, the owner may resume the possession of the property and thereby revoke his offer: *Hayward* v. *Manzer*, 70 Cal. 476; *State* v. *Trask*, 6 Vt. 355; 27 Am. Dec. 554, 566; *Field* v. *Manchester*, 32 Mich. 279; *County of Wayne* v. *Miller*, 31 Id. 447.

In this case there was no use of the street, and no attempt to accept the dedication by formal act of the public authorities for more than twenty years. This was not within a reasonable time, as shown by the authorities cited above, and therefore came too late. But if this were not so, we think the ordinance passed by the common council of the city was not in any sense an acceptance of the dedication. It did not refer to the appellant or his alleged dedication of the street. As was well said in the former opinion, it appears more like an attempt to take private property for public use without compensation than an acceptance of the street.

There was neither a dedication to nor an acceptance by the public in this case: *Littler* v. *City of Lincoln*, 106 Ill. 353; *Kennedy* v. *Mayor etc.*, 65 Md. 514; 57 Am. Rep. 346.

Judgment reversed, with instruction to the court below to conform its conclusions of law to the views expressed in this opinion, and to render judgment on the findings in favor of the defendant.

IN THE CASE of *City of Eureka* v. *Croghan*, 81 Cal. 524, the question to be determined was, whether the land in controversy had been dedicated by one Cushing to public use as a street. On April 7, 1870, Cushing, who was then

the owner of the land in controversy, with other lands, executed to one Leary a deed of land described as commencing at the northwest corner of a block of land bounded on the north and west by Tenth and F streets, if said streets were projected; thence running south along the east line of F Street, if said street were extended southerly, 120 feet; thence easterly at right angles with said F Street; thence northerly, and parallel with F Street, 120 feet; thence westerly along the south side of Tenth Street, 120 feet, to the place of beginning, being the northwest quarter of the block. On August 8, 1870, Cushing sold to Croghan, the appellant, a piece of land, including the premises in controversy. At this latter date, no part of the tract was inclosed. From the date of his purchase, Croghan always paid taxes on the land, and in 1876 he built a house on the western half of the premises in controversy, and constructed fences across the same. In 1844, he fenced in the eastern half of the land. Up to the time the house was built, the public passed over the lands in controversy, but the city authorities never worked or improved the same, nor was any ordinance or order passed accepting them for public use. The court below found that the land in controversy had been dedicated to the public for use as a street, but the supreme court held that the evidence was insufficient to support that finding. Paterson, J., who delivered the opinion of the majority of the court, said: "The only evidence of dedication is found in the description of the land in the deed made by Cushing to Leary. To constitute a valid dedication, the *animus dedicandi* must be shown to exist; it must be shown clearly, indicated by unequivocal acts, and there must be an acceptance by the public. Until such acceptance, the declaration or act of the owner is a mere offer, and cannot be made effectual as an irrevocable dedication: *Hayward* v. *Manzer*, 70 Cal. 476. We think that the subsequent conveyance of the land in controversy was a complete revocation by Cushing of the offer, there having been no acceptance by the public or by the city authorities at the time he conveyed to appellant. The act of Cushing in conveying to Leary by the description given above is qualified by his subsequent conveyance of the land in controversy to Croghan. If the conveyance to Leary be taken as an offer by Cushing to dedicate the land in controversy to public use, the subsequent deed to Croghan operated as a revocation of that offer. In determining whether there was a present intention on the part of Cushing to dedicate the land to public use at the time he conveyed to Leary, — and the intention is the soul of every act of dedication, — the conveyance to appellant, about four months thereafter, of the land in controversy is an important matter to be considered. It is certainly as strong an indication of the non-existence of the *animus dedicandi* as the first deed was of an intention to dedicate to public use." The learned judge further held that while no formal acceptance on the part of the city was necessary, yet, in the absence of such formal act, the owner had the right, at any time prior to a public use, to revoke his offer, and resume possession and control of the property; citing the principal case. The cases relied upon by the court below (*People* v. *Blake*, 60 Cal. 499, and *Breed* v. *Cunningham*, 2 Id. 369) were not, he thought, applicable. In those cases, the parties that dedicated the land to public use had platted the same into lots, blocks, streets, and alleys, and had sold the lots and blocks with reference to the streets laid out and adopted by them. In this case, Cushing did not survey his land into lots, blocks, and streets, nor did he plat the same. In reply to the respondent's contention that the evidence showed an acceptance by the public before the conveyance to the appellant, he said that a fair construction of the finding of the court and of the evidence showed simply a casual use by the public of the land, which was

open and uninclosed. This use was the same after as before the alleged dedication, and appeared to be permissive merely, and such as the owner had a right to end at any time. The city was not bound to accept the offer to dedicate, if such an offer was made; and in the absence of a formal acceptance, it should appear that the use by the public was under a claim of right, and not by a temporary license of the owner. The judgment was reversed.

In the subsequent case of *Phillips* v. *Day*, 82 Cal. 24, the question of dedication of land to the public use was presented to the court under the following facts: The parties entered into a contract for the sale of the land in dispute upon certain conditions. Part of these the vendee performed, and then declined to perform the remainder, on the ground that the vendor could not give him a perfect title. He then brought his action to recover the money already paid, and defendant, by way of answer and cross-complaint, demands that plaintiff specifically perform his contract. The land in dispute was owned, fenced, and cultivated by one Richard Fulkerson for more than thirty years. He conveyed it to one J. B. Armstrong, who went into possession, and laid it off into streets, blocks, and lots. The street on which the land bargained for is situated was graded and graveled; but this land, together with a larger tract owned by said Armstrong, or W. Armstrong, his successor in interest, was always kept inclosed by means of fences and gates which were always maintained and never removed by them. J. B. Armstrong, while owner of the tract, sold three of the lots, none of them on the improved street. He afterwards conveyed the remainder of the tract to W. Armstrong, who sold several of the lots, four at least of them being on the graveled street. After so conveying, he filed for record a map or plat of the tract, naming it Norwood, and showing lots, blocks, and streets, and on the same day conveyed the remainder of the tract to Richard Fulkerson. These conveyances between the Armstrongs and Fulkerson recognized the map or plat, but included the street. One Riley, who purchased from W. Armstrong, went into possession and fenced the south line of the improved street. It does not appear whether the other purchasers from the Armstrongs ever went into possession, or to what extent they used the streets to get to their lots. All of the lots sold by the Armstrongs were reconveyed to R. Fulkerson, and by him conveyed to John Fulkerson, without referring to the streets, except a part of lots 28, 29, 30, 31, and 32, which had been conveyed to J. H. Abshire. The map shows that no part of the latter's claim extended to the improved street, but it does include the whole of so much of a street as ran near its westerly boundary, and takes a strip off the lots on the west side of the street. John Fulkerson conveyed a right of way to Abshire over the south thirty feet of the improved street, and moved his fence marking the south line of lot 3, which is part of the land in dispute, to the middle of the street, so that the north thirty feet of the graveled street was thereafter within the inclosure, inclosing the land in question. This fence still stands, and has been maintained for more than five years before the contract of sale was made. John Fulkerson conveyed to defendant in August, 1886, by metes and bounds, making no reference to the streets or the map. This conveyance included a triangular piece of land on the north side of the Day tract, having the northeast corner of the tract for its apex, and about three feet on the Healdsburg road as its base, previously conveyed by Fulkerson to one Viles; but neither Day nor Fulkerson had any knowledge that the deeds overlapped. This triangle was within the inclosure of Day. On the north side of the tract in dispute another street is laid down on the map, which, were it a public highway, would take off another strip of

thirty feet from the land in dispute. It is not shown that the public ever used any of the streets, nor that they were accepted as such by the county authorities. It is contended by plaintiff that the streets north and south of his land are public streets, dedicated to public use as such, and that were he compelled to purchase he would lose a strip of thirty feet on both these streets, and that for this reason, and because the title to the triangle is not in Day, he should not be compelled to purchase. The court below decreed a specific performance of the contract. Plaintiff moved for a new trial. This was denied, and he appealed.

In delivering the opinion of the supreme court, Works, J., refers to *People* v. *Reed*, *supra*, as adjudicating what is necessary to constitute a dedication of lands to the public for streets by platting and selling lots, by reference to a map thereof, and holds that that decision is conclusive against this appellant as to any dedication; that as there had never been any acceptance by the authorities, even if there had been an offer to dedicate, it was withdrawn by the subsequent sale of the property in a body, including that designated on the map as streets. All of the purchasers acquired title before the map was filed, and all of them, except two, reconveyed to the grantor or his grantees under a conveyance of the whole property included in the map, except that previously conveyed, and the property in controversy has always remained fenced. One of the purchasers who has not reconveyed has expressly waived all right to have the streets on the front of his lots kept open, and the other did not purchase on the faith of the map; his property does not touch any street that runs through or affects the land in dispute. The owner of the land at the time it was platted did not file the map. The land was not within the limits of any municipality; it has always remained fenced, and has never been used as a street. The map was filed after the property had been conveyed in lots, and then reconveyed in a body. The map was filed the day that the land was conveyed a second time in a body. Therefore there was no dedication.

"The question of dedication is purely one of intention, and the intention of the owner or owners of the land must be gathered from his acts and conduct in respect to the property"; citing *Harding* v. *Jasper*, 14 Cal. 647; *People* v. *Reed*, *supra*. No right to the streets vested in the public, and the property was reconveyed in a body, including the streets, fenced and occupied for more than five years before the contract to convey to the appellant; therefore the right of any purchaser was barred by the statute of limitations, and could not be enforced. The defendant showed a clear paper title to the property in dispute, and the burden was upon appellant to show a defect therein, or any circumstance which would prevent the statute from running against any of the purchasers, in order to avoid specific performance of his contract: *Shriver* v. *Shriver*, 86 N. Y. 575: *Hellreigel* v. *Mannering*, 97 Id. 59.

No reasonable doubt as to defendant's title to the property is raised; but such title is shown to have been in him as binds the appellant to accept the conveyance and pay the purchase-money. No dedication of the streets as to the purchasers is shown which could have been enforced at any time; and if they ever possessed such right, it was lost by lapse of time. The judgment and order is affirmed, and a rehearing denied. In this opinion Fox, McFarland, Paterson, Sharpstein, JJ., and Beatty, C. J., concurred. Thornton, J., concurred in the judgment.

[IN BANK.]

MORGAN *v.* BALL.

[81 CALIFORNIA, 93.]

GIFT BY HUSBAND TO WIFE, CHANGE OF POSSESSION TO SUSTAIN. — When a husband in solvent circumstances gives his wife personal property, which is at once delivered to her, and the husband never resumes possession thereof as owner, but declares it to be hers, and simply continues to use it as he had hitherto done, and the wife takes possession of the property, and openly claims to be the owner of it, using it as a wife ordinarily does, and being acknowledged by all others who use it as its owner, the transfer of the property is not invalid as against the subsequent creditors of the husband, on the ground that it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession.

MERE USE BY HUSBAND OF PROPERTY GIVEN BY HIM TO HIS WIFE when he is solvent, which is the same after as before the making of the gift, will not render the gift void as to debts contracted by him while so using it, if delivery of possession was immediately made to the wife, and the possession has been continuous, and such as is usual when a gift of this sort is made by a husband to a wife, and his declarations and the acts of others who use the property are made and done in open acknowledgment of her ownership of and control over it, as distinct and changed from her husband to her.

ACTION to recover possession of personal property. The opinion states the case.

Reardan and Freer, and H. V. Reardan, for the appellant.

John Gale, for the respondent.

FOOTE, C. This action is for the recovery of the possession of certain personal property from the hands of the defendant, or if delivery cannot be had of the property, for its value. The court below gave judgment as prayed for, and from that this appeal is taken.

In a former adjudication by the appellate court, the property concerning which this litigation is now had was declared to be that of the plaintiff, derived by gift from her then husband, W. J. Morgan, and made by him without any fraud as to his existing creditors: *Morgan* v. *Hecker*, 74 Cal. 540.

It appears from the findings in the present cause that the property, consisting of a mare, her colt, and a buggy, were were given to the plaintiff, Belle M. Morgan, then the wife of W. J. Morgan, by him, in good faith, when he was solvent and able to pay his debts, and that at the time of the making of the gift the property was delivered to and accepted by his wife.

Several years after the gift was so made, delivery and acceptance had, the husband became indebted upon a promissory note to one Daniel McCarthy in the sum of three hundred dollars. After the note became due, on the 3d of May, 1888, it having been transferred to Fred Hecker, he commenced an action to recover what was due upon it. On the day the action was begun, an attachment was issued in aid of it, and on the 3d of May, 1888, was levied by the sheriff of Butte County, the defendant here, upon the property involved in this discussion.

On the 18th of May, 1886, Belle M. Morgan filed an inventory of her separate property, including the mare and buggy, but not the colt, in accordance with the provisions of sections 165 and 166 of the Civil Code.

About the month of May, 1886, W. J. Morgan, the husband of the plaintiff, left the state of California, and has never returned. At the time of his departure, and on the 23d of March, 1886, when he became indebted to McCarthy on the note afterwards transferred to Hecker, Morgan was greatly in debt and insolvent.

It is further found that after the sixth day of July, 1883, the day on which Morgan gave and delivered possession of the property to his wife, as set forth heretofore, and until his departure from this state in 1886, he used it jointly with her, with her consent and knowledge, and that his use of it was the same after as before the gift; that there was nothing in the use of the same property by the plaintiff, Belle M. Morgan, which was inconsistent with its ownership by her husband, the donor, or from which the public could determine that the title of the property had passed, by gift or otherwise, to the plaintiff; that the colt was the foal of the mare, and all the expense of its getting and rearing was paid by the husband; that the use of the colt by him after its birth was identical with his use of the mare and buggy, but that at all times after the gift and delivery of possession was made, the husband represented, claimed, and admitted that the property in question was the separate property of his wife, and whenever it was loaned out or used by any other person than the wife or her husband, it was loaned out and used by the direction and consent of the wife, and not by that of the husband; that during nearly all of the time since the departure of the husband from the state, and from whom it seems at this time the wife is divorced, the property has been the subject of litigation, and in the hands

of the sheriff of Butte County; that during such times as it has not been in the hands of the sheriff, the said plaintiff has had the exclusive possession and use thereof.

Upon this state of facts, the appellant contends that the transfer to the plaintiff of the personal property now under consideration was fraudulent and void as against the successor of the husband's creditors, because, as is claimed, such transfer is not shown to have been accompanied by "an immediate delivery, and followed by an actual and continued change of possession of the thing transferred," so as to satisfy the provisions of section 3440 of the Civil Code.

In this connection it is urged that for the wife to be able to maintain her claim she must have complied with sections 165 and 166 of the Civil Code, as otherwise the use by her husband of the property in a similar manner after as before the gift would be obnoxious to the provisions of section 3440, *supra*. And as she did not so comply until the creditors' rights had attached, it was of no avail.

Admitting, as the defendant contends, that sections 165 and 166, *supra*, were intended as a means to enable a wife to protect her rights, because of the difficulty resulting from her relations as wife, in showing an immediate delivery and actual and continued change of possession to her from her husband, yet it seems to us that the provisions of section 3440, *supra*, have, in this instance, been fully met.

The property was delivered to her, and she took immediate possession of it, when her husband was solvent and could legally invest her with title; her possession was actual and continuous so far as it could be, considering the relations she bore to her husband. His use of it was the same, so far as he was concerned, as it had always been. Her use was not inconsistent with his ownership, but the use of it by all other persons was openly as her property. It was proclaimed by her husband that the property was hers, and it seems to have been publicly known and recognized as hers by all who used it. In what other better way could the wife, consistent with her relations as wife, have maintained and had an immediate delivery of possession, followed by an actual and continued change of possession? She did not refuse her husband the use of it, but she did take it into possession at once, and continuously keep and use it as hers as to all the world, and it was not in any way used or possessed by her husband, except as subordinate to her dominion, possession, and control. The object of sec-

tion 3440, *supra*, as contended for by the defendant, is to require an immediate delivery and continued change of possession of personal property after its transfer, in order, as he says, to give notice to the world that ownership has changed.

If that is so, then, when a husband in solvent circumstances gives his wife personal property, which is at once delivered to her, and the possession is not resumed or continued by the husband as the owner of the property, but he simply continues to use it as he has hitherto done, and the wife has actual possession, and claims it openly as owner, he declares it as hers, and all their acts show to the public that the property is hers from the date of the gift, she uses it as a wife ordinarily does, and all others use it as hers, acknowledging and owning it as hers, it seems to us that the object of the law is accomplished.

It has been held that it is sufficient if there are circumstances which authorize the inference of a change of ownership: *Clark* v. *Rush*, 19 Cal. 394. It cannot be that the circumstance of a mere use by the husband of property given by him to his wife when he is solvent, and can legally present her with it, such use being the same after as before making the gift, will make the gift void as to debts contracted by him while so using it, if a delivery of possession was made immediately to the wife, and that possession has been continuous, and such as is usual when a gift of this sort is made by a husband to a wife, and the acts and declarations of both these parties, and the acts of all other persons who use the property, both before and after the debt is incurred by the husband, are openly declarative and in acknowledgment of the wife's ownership and control over it, as distinct and changed from her husband to her.

We perceive no prejudicial error, and advise that the judgment be affirmed.

GIBSON, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

HUSBAND AND WIFE. — If, at the time a wife purchases a lottery ticket, her husband agrees that whatever prize may be drawn thereon shall be her separate property, and the money, when drawn, is placed in bank in the wife's name as her separate property, these facts constitute the money the sole property of the wife, as between herself and husband, and also against the creditors of the husband, if, at the time of the transaction, he had ample

means to satisfy all their claims: *Dixon* v. *Sanderson*, 72 Tex. 359; 13 Am. St. Rep. 801. And where a husband is indebted to his wife, he may make a valid transfer of choses in action to her as security for such indebtedness: *Battle* v. *Mayo*, 102 N. C. 414.

MARRIED WOMAN DOES NOT RENDER HER PERSONALTY liable for her husband's debts merely by allowing him to control it in a manner consistent with their common interests: *Dean* v. *Bailey*, 50 Ill. 481; 99 Am. Dec. 533, and note.

WADSWORTH *v.* WADSWORTH.

[81 CALIFORNIA, 182.]

DEFAULT, RELIEF AGAINST, IN ACTION FOR ANNULMENT OF MARRIAGE. — In actions for divorce or for annulment of marriage, courts should afford to the parties the fullest possible hearing, and should be more liberal in relieving against defaults than in other actions.

CROSS-COMPLAINT IN ACTION OF DIVORCE OR FOR ANNULMENT OF MARRIAGE. — There may be a cross-complaint in an action for divorce or for annulment of marriage.

ACTION for annulment of marriage. The opinion states the case.

W. C. & I. G. Burnett, and Dorn and Dorn, for the appellant.

Tyler and Tyler, for the respondents.

George D. Collins and Fisher Ames, amici curiæ.

HAYNE, C. This action was brought against William Wadsworth, Sen., for annulment of marriage, upon the ground that at the time of the marriage he had a wife living. William Wadsworth, Jr., was joined as a defendant, upon the alleged ground that the other defendant had transferred to him without consideration property purchased in part with funds of the plaintiff, and which would be community property if the marriage had been valid. William Wadsworth, Jr., made default. William Wadsworth, Sen., filed an answer, averring in substance the validity of the marriage. He filed with his answer a cross-complaint for a divorce from the plaintiff on the ground of desertion. The plaintiff filed an answer to the cross-complaint, denying the desertion. By some inadvertence the attorney for the plaintiff did not appear at the trial, and she was not represented thereat. The court granted the defendant a divorce upon his cross-complaint. Within six months the plaintiff moved to have the judgment set aside, on the ground of excusable neglect. This motion was denied,

and the plaintiff appeals from the order denying the motion. There is no bill of exceptions. But the stipulation made by the parties is, in our opinion, sufficient for the purposes of the appeal: *Bonds* v. *Hickman*, 29 Cal. 461; *Solomon* v. *Reese*, 34 Id. 34.

1. So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in *McBlain* v. *McBlain*, 77 Cal. 509. In that case the court, per Paterson, J., said: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters." In the present case, there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while in an ordinary action the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of case a more liberal rule should prevail. And we think that the same reasons require the application of a liberal rule to proceedings for the annulment of marriage, and therefore that the judgment should have been set aside as to the whole case.

It is argued for the plaintiff that the defendant cannot have a cross-complaint in this kind of an action. This question will necessarily arise when the case goes back to the trial court, and should be disposed of. It has long been the practice in this state for the trial courts to entertain cross-complaints in actions for divorce. Doubt was cast upon this practice by what was said in *Haley* v. *Haley*, 74 Cal. 489. The point was not decided by that case; but McKinstry, J., in the course of the opinion, said: "It may not be improper to remark that it is at least doubtful whether the codes provide for a cross-complaint in actions for divorce," and he went on to explain why it was doubtful. The respect which we have for the opinion of that learned judge has induced us to make a careful examination of the subject.

There can be no doubt that in the English ecclesiastical courts the defendant could have affirmative relief, not only upon a cross-demand, but even upon his answer, if the evidence showed that he was entitled to it. This was held in the case of *Best* v. *Best*, 1 Add. Ecc. 411. That was a suit for divorce *a mensa et thoro*, upon the ground of cruelty. The defendant set up the adultery of the plaintiff. No relief was

granted to either party. But upon the authority of Sir George Saville's case, *Dynely* v. *Dynely*, decided in 1732, and *Mathew* v. *Mathew*, decided in 1769, the court laid down the rule above stated, and said: "That a cross-suit or separate citation is necessary, however, under such circumstances, has never been asserted, that I am aware of, from that time to the present, and the practice of either, thus held to be optional, appears from that time to have been finally dispensed with."

In *Dysart* v. *Dysart*, 1 Rob. Ecc. 106, in which the husband sued for a restitution of conjugal rights, and the wife sought a divorce on the ground of cruelty, Dr. Lushington said, with reference to the charge of cruelty: "If that charge be proved, it is clear that not only must the earl fail in obtaining the decree he prays for, but that the countess will be entitled to a decree of separation." But upon the evidence he held that the charge was not proved.

In *Clowes* v. *Jones*, 3 Curt. Ecc. 185, it was held that in a suit by a husband for nullity of marriage, it was competent for the wife, without taking out a cross-citation, to sue for a restitution of conjugal rights.

In *Annichini* v. *Annichini*, 2 Curt. Ecc. 210, which was a suit for restitution of conjugal rights (subsequently turned into a suit for separation), Dr. Lushington denied the plaintiff's prayer, and granted the defendant's application for a separation.

In reference to this subject, Mr. Poynter, in his treatise on the doctrine and practice of ecclesiastical courts relative to the subject of marriage and divorce, second edition, pages 241, 242, says: "To bar a suit for the restitution of conjugal rights, acts of cruelty or adultery may be counter-pleaded, as constituting lawful grounds for a separation, and when so pleaded merely for the purpose of barring suit, evidence less circumstantial than what is required to warrant a sentence of divorce in an original suit may possibly be held to be sufficient. But if the counter-plea of cruelty or adultery happen to be sufficiently proved, the defendant in the suit for restitution is not only entitled to be dismissed from that complaint, but the suit may in effect change its character at the prayer of the complainant, who becomes entitled to a sentence of divorce as if in a suit prosecuted for that specific object." And the learned author appends to the above text the following note: "Anciently in all matrimonial suits wherein adultery was intended to be offered on behalf of the defendant, a cross-suit, or at least a

citation to the plaintiff to answer to that charge, returnable in the original suit, was held to be requisite; but it was solemnly determined by the delegates in Sir George Saville's case that in a suit for the restitution of conjugal rights, adultery may not only be pleaded in bar, but a divorce may be had in consequence of it: *Best* v. *Best*, 1 Add. Ecc. 412."

And Mr. Bishop says, with reference to the practice: "The flexibility of the practice in the ecclesiastical courts has already been mentioned. In it parties were, in effect, both plaintiff and defendant at the same time. So that, for example, one proceeded against for divorce *a mensa et thoro*, or for nullity of the marriage, or for restitution of conjugal rights, not only could bring forward a complete wrong done by the other party in defense of the suit, but if he succeeded in his proofs, he could have the proper sentence rendered in his favor as though he was the original plaintiff": 2 Bishop on Marriage and Divorce, 6th ed., p. 316.

The matter has been regulated in England by statutes, among which may be mentioned 29 and 30 Victoria, chapter 32, section 2. And the subsequent practice has been accordingly: See, generally, *Blackburne* v. *Blackburne*, L. R. 1 D. & M. 563; *Brown* v. *Brown*, L. R. 3 D. & M. 202; *D.* v. *D.*, L. R. 10 P. D. 75; *Moore* v. *Moore*, L. R. 12 P. D. 193.

The practice in the English ecclesiastical courts has not been adopted in America to its full extent; that is to say, the defendant cannot have affirmative relief upon his answer alone, unless it be in the states of Georgia and Nebraska: See *Owen* v. *Owen*, 54 Ga. 526; *Shafer* v. *Shafer*, 10 Neb. 468. But the practice of giving affirmative relief on a cross-complaint, or, as it is sometimes called, a counterclaim, prevails in many of the states. In some of the states there is express provision of statute to this effect: See *Stoner* v. *Stoner*, 9 Ind. 505; *Glascock* v. *Glascock*, 94 Id. 163; *Ficke* v. *Ficke*, 62 Mo. 337; compare *Hoffman* v. *Hoffman*, 43 Mo. 547. In other states where the practice prevails, we have not been able to ascertain whether there is an express provision of statute or not: See *Hoff* v. *Hoff*, 48 Mich. 281; *Sterl* v. *Sterl*, 2 Brad. App. 223; *Lee* v. *Lee*, 1 Duvall, 196. But in New York, where there is only a general statute as to counterclaims, the practice prevails: See *Campbell* v. *Campbell*, 12 Hun, 636; *Bleck* v. *Bleck*, 27 Id. 296; *McNamara* v. *McNamara*, 2 Hilt. 548; *Waltermire* v. *Waltermire*, 110 N. Y. 183. And so in Iowa: See *Wilson* v. *Wilson*, 40 Iowa, 233. And the point has been expressly ruled

in Oregon. There the general provision is as follows: "The counterclaim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases specified in the subdivisions of section 72, it is sufficient if it be connected with the subject of the suit." This provision was held sufficient to warrant a cross-demand for divorce, and the court, per Lord, C. J., said: "To compel the defendant to bring a new suit and go over the same evidence, which could be as well given in the existing action, would be vexatious, and in fact unnecessary. On the other hand, to allow such an answer, the rights of the parties could be adjusted in one suit, and much inconvenience and delay avoided. It is always desirable that there be as speedy a determination of litigation as is consistent with a proper examination and consideration of the case": *Dodd* v. *Dodd*, 14 Or. 338.

With reference to the American practice, Mr. Bishop says: "The practice of bringing a cross-suit by the defendant against the plaintiff to aid the defense and obtain affirmative relief may be resorted to in divorce cases the same as in any other. It is permissible equally whether the proceeding is by bill in equity, by libel corresponding to the ecclesiastical libel, or by a statutory complaint. The subject needs no particular illustration. Even, it has been held, a defendant may maintain his cross-bill for divorce, though he has not the statutory residence in the state necessary in an original complaint": 2 Bishop on Marriage and Divorce, 6th ed., p. 318.

The prevalence of the practice in other jurisdictions is very persuasive of its convenience and efficiency. And that it is convenient and safe would seem to result from general principles. Why should not all the marital difficulties of a couple be adjusted in a single suit? A suit for divorce under our system has been held to be a suit in equity: *Lyons* v. *Lyons*, 18 Cal. 448; *Sharon* v. *Sharon*, 67 Id. 185. Is there any principle of equity which favors litigation by piecemeal? In the majority of cases, if affirmative relief can be granted to the defendant at all, it can be granted upon the evidence introduced upon the issues raised upon the complaint, or at all events such evidence is pertinent and material upon the cross-demand. In such cases, what useful purpose would be subserved by compelling the defendant to face the expense and delay of another suit in which substantially the same evidence is to be introduced? It has long been usual in this

state to have such relief on cross-complaint. And in at least two cases the practice has been impliedly sanctioned by the supreme court: See *Coulthurst* v. *Coulthurst*, 58 Id. 239; *Bovo* v. *Bovo*, 63 Id. 77. And it is safe to say that the remarks in *Haley* v. *Haley*, 74 Id. 489, took the profession by surprise.

Is the language of the statute broad enough to warrant this widely extended and useful practice? The provision is as follows:—

"Sec. 442. Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint."

It is said in *Haley* v. *Haley*, 74 Cal. 489, that "an action for divorce is not brought on the 'contract' of marriage, but upon certain violations of duties or obligations annexed to the *status* of matrimony." It is submitted, however, that to construe the phrase "contract . . . . upon which the action is brought," either in the strict common-law sense in which an action is brought "upon" a contract, or so as to confine its operation to suits affirming the validity of the contract and seeking to enforce it, would be to take an extremely narrow view of the provision, and to materially restrict its operation. A suit to rescind a contract, for example, would not be "upon" the contract in the above senses, and yet it cannot be doubted that the defendant in a suit to rescind a contract could maintain a cross-complaint for specific performance of the contract, if the facts of the case entitle him to specific performance. But a suit to rescind a contract is no more "upon" the contract in the above senses than is a suit for divorce. It may be conceded that the married state is a *status*. But it is a *status* which results from a contract: Civ. Code, sec. 55. And when the *status* is dissolved, the contract is certainly not left in force. If not left in force, it must be dissolved by the decree. And if so, the suit is at least in part for the dissolution of a contract. This being so, may not the cross-demand be said to be one "relating to . . . . the contract . . . . upon which the action is brought," in the sense of the statute? In an Iowa case the court held that the relief was within the mean-

ing of the statute of that state in relation to counterclaims, saying: "The plaintiff seeks to annul the marriage contract on account of an alleged violation of it by the defendant. The defendant, upon the other hand, seeks to annul the same contract on account of violations of the same by the plaintiff. The matters arose out of the contract set forth in the petition, and are connected with the subject of the action": *Wilson* v. *Wilson*, 40 Iowa, 233.

We think, therefore, that, upon principle as well as upon authority, there may be a cross-complaint in an action for divorce. And the rule seems to us to apply in actions for annulment of marriage.

The demurrer was to the effect that William Wadsworth, Jr., should not have been joined as a party defendant: Compare *Way* v. *Way*, 67 Wis. 662. But this question does not arise upon appeal by plaintiff on order refusing to set aside a judgment in favor of the defendant.

We advise that the order appealed from be reversed, and the cause remanded for a new trial upon all the issues.

BELCHER, C. C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order appealed from is reversed, and cause remanded for a new trial upon all the issues.

Hearing in Bank denied.

DIVORCE, VACATION OF A DECREE OF: Note to *Burnham* v. *Hays*, 58 Am. Dec. 393.

DORLAND *v.* HANSON.

[81 CALIFORNIA, 202.]

ORDER OF SALE UPON DECREE ENFORCING LIEN CANNOT ISSUE AFTER FIVE YEARS. — Section 681 of the Code of Civil Procedure, which limits the time within which an execution can issue to five years after the entry of the judgment, applies as well to a decree foreclosing the lien of a street assessment, and an order of sale thereunder, as to a personal judgment for the recovery of money and an execution thereon. Section 685, which allows a judgment to be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings, applies only to a judgment requiring the party against whom it is rendered to do some specific act.

SUSPENSION OF POWERS OF ADMINISTRATOR DOES NOT SUSPEND RUNNING OF STATUTE. — The fact that the powers of an administrator whose duty it

was to cause an order of sale to be issued were suspended for a part of the time cannot have the effect of suspending the running of the statute limiting the time within which such order can be issued.

ORDER MADE BY ONE DEPARTMENT OF SUPERIOR COURT MAY BE VACATED BY ANOTHER DEPARTMENT. — Where one department of a superior court makes an order authorizing the issuance of an execution, another department of the same court may, in a proper case, make an order vacating such order. It is the same court acting in each instance, and the fact that the orders are made in different departments is immaterial.

ORDER AUTHORIZING ISSUANCE OF EXECUTION, THOUGH APPEALABLE, MAY BE SET ASIDE. — An order authorizing the issuance of an execution, though an appealable order, may be attacked by a motion to vacate and set it aside, and the same is true of the sale made under it.

APPEAL from an order vacating an execution. The opinion states the case.

J. M. Wood and J. C. Bates, for the appellant.

Sullivan and Sullivan, for the respondent.

WORKS, J. The only question in this case is, whether or not an execution or order of sale can issue upon a decree foreclosing a street assessment after five years. The court below held it could not, and set aside and vacated a former order authorizing such writ to issue, and vacating a sale made thereunder. From this order the appellant prosecutes this appeal.

Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." And section 685 provides: "In all cases other than for the recovery of money the judgment may be enforced or carried into execution, after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon sufficient pleadings."

The contention of the appellant is, that the first of these sections applies solely to personal judgments for the recovery of money, and that a judgment for the foreclosure of a street assessment lien, where there can be no personal judgment, is not within that section, but is covered by section 685, and that therefore her execution or order of sale was properly issued by leave of court after five years.

We do not so construe these sections. Section 681 must be held to apply to a judgment, the object, purpose, and effect of which is to enforce the payment of money, whether the same

be a personal judgment against the party indebted, or a decree foreclosing a lien for an amount due. Section 685 was evidently intended to and does apply to judgments requiring the party against whom it is rendered to do some specific act, as, for example, to deliver specific real or personal property. Taking this view of the two sections, we must hold that the order of the court below vacating the order authorizing the issuance of the writ after five years, and vacating the sale made under such writ, was right.

It was claimed in the opening brief of the appellant that the full five years had not run, because, during a part of the time, the powers of the administrator, whose power and duty it was to cause the writ to be issued, were suspended; but this contention is expressly abandoned in the closing brief, and it is admitted that the suspension of the powers of the administrator could not have the effect of suspending the running of the statute.

The order authorizing the issuance of the execution was made by one department of the court below, and the order vacating the same by another department of the same court; and it is contended that this was erroneous. We see no force in this position. It was the same court acting in each instance, and the fact that the orders were made in different departments is immaterial.

Again, it is said that the order authorizing the issuance of the writ was an appealable order, and could not be attacked in this way. Conceding the order to have been appealable, the execution issued was void, if the court had no authority to order its issuance, and might be attacked by a motion to vacate and set it aside, and the same may be said of the sale made under it. Therefore, the only material question was, whether the execution and sale should be set aside; and as to the power of the court below to set them aside, conceding the order authorizing the writ to issue to have been an appealable order, we have no doubt.

Counsel attempt to distinguish between an execution and an order of sale, and contend that section 681 is confined in terms to the former, and does not limit the time in which the latter may issue. We think, however, that the difference between the two writs is more in the name than anything else, so far as it affects the question before us, and that section 681 must be held to apply to both.

The order appealed from is affirmed.

LIMITATION OF ACTIONS. — The fact that there is no person in existence competent to sue does not prevent the operation of the statute of limitations; so held in an action of ejectment, where the owner of the land had died, and his estate remained for many years without administration, and there was no one capable of suing for possession thereof: *Tynan* v. *Walker*, 35 Cal. 634; 95 Am. Dec. 152.

[IN BANK.]

GLEASON *v.* SPRAY.

[81 CALIFORNIA, 217.]

HOMESTEAD, DEED OF, BY HUSBAND ALONE IS VOID, AND ACQUIRES NO VALIDITY FROM SUBSEQUENT ABANDONMENT OF THE HOMESTEAD. — A deed of property upon which there is a subsisting homestead, which is executed by the husband alone, whether absolute or intended as a mortgage, is void, and can acquire no validity by an abandonment of the homestead subsequently made by both husband and wife. The abandonment of the homestead has no retroactive operation.

CONSTRUCTION OF STATUTE PRESCRIBING MODE OF DOING ACT. — When a statute says an act cannot be done unless performed in a certain mode, the inhibition against performing it in any other way is just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose.

SECTIONS OF STATUTE IN PARI MATERIA MUST BE READ TOGETHER, and effect given to each.

EJECTMENT. The opinion states the case.

Spencer and Raker, for the appellants.

Goodwin and Jenks, *Ewing and Claflin*, *and J. J. May*, for the respondents.

GIBSON, C. Ejectment to recover certain lots in the town of Alturas, Modoc County. Trial before the court without a jury; judgment for defendants, from which, and an order denying a new trial, plaintiffs appeal.

The court found and adjudged that the principal instrument, in the form of a deed absolute, relied upon herein for a recovery was intended and accepted as a mortgage; and that the same, having been executed by the husband alone while the property in controversy was a homestead, was void, and of no effect.

The defendant J. D. Spray, while the owner of and residing with his wife upon the property, on October 20, 1884, made, acknowledged, and caused to be recorded a declaration of homestead embracing the same property. And on April 7, 1885, while the homestead thus created was still subsisting, he, Spray, executed and delivered to George M. Gleason, one

of the plaintiffs, a general warranty deed, absolute in form, embracing the homestead, with other real property. This deed the court found was intended as a mortgage. Thereafter, on May 25, 1885, the defendants, Spray and wife, by a joint declaration to that effect duly filed in the proper office, abandoned the homestead. On May 26, 1886, George M. Gleason, by a deed of gift, conveyed to Julia, his wife, the same property described in Spray's deed to him.

The first question arising on these facts is, as to whether the deed of Spray to Gleason was absolutely void or only inoperative against the homestead while it existed as such.

It does not clearly appear whether the property in question was the separate property of Spray, or the community property of himself and wife; but whatever its character may have been, it was, by the declaration of homestead, converted into the joint property of both: Civ. Code, sec. 1265; *Burkett* v. *Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58.

"The homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife": Civ. Code, sec. 1242. In the homestead act of 1860, as amended in 1862 (Stats. 1862, sec. 2, p. 519), a similar provision is found; it reads as follows: "No alienation, sale, conveyance, mortgage, or other lien of or upon the homestead property shall be valid or effectual for any purpose whatever, unless the same be executed by the owner thereof, and be executed and acknowledged by the wife, if the owner be married, and the wife be a resident of this state, in the same manner as provided by law in case of the conveyance by her of her separate and real property."

Under this provision it was held in *Barber* v. *Babel*, 36 Cal. 11, that a mortgage of the homestead property, executed by the husband alone for the purpose of reviving a prior mortgage on the same property, executed before the homestead was selected, was void and of no effect.

Although the wording of the code provision is different from that of the homestead act above set forth, we think both provisions are the same in effect, and designed to protect the wife in the security of a home by preventing the alienation of the homestead in any mode other than that prescribed by law: *Barber* v. *Babel*, *supra*; *Burkett* v. *Burkett*, *supra*.

When a statute says an act cannot be done unless performed in a certain mode, the inhibition against performing it in any

other way would seem to be, in view of the word "cannot," meaning an absence of power, to be just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose.

An examination of the other two sections of the Civil Code bearing upon the alienation and abandonment of homesteads convinces us that the construction given in *Barber* v. *Babel*, *supra*, to the provisions of the homestead act is correct, and should be applied to section 1242 of the Civil Code. Thus, by the provisions of section 1243, "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged,—1. By the husband and wife, if the claimant is married; 2. By the claimant, if unmarried." And by section 1244, "a declaration of abandonment is effectual only from the time it is filed in the office in which the homestead is recorded."

These three sections are *in pari materia*, and must be read together and effect given to each. Sections 1242 and 1243 prescribe how homesteads may be alienated or encumbered, and the last-mentioned section, in addition thereto, how they may be abandoned, and section 1244, the time from which the abandonment becomes effectual. This last section, it is to be observed, fixes the time when the homestead character of the property is extinguished by abandonment, and does not give the abandonment any retroactive operation. The provision relating to abandonment in the homestead act of 1860, as amended in 1862, was, that the homestead would be deemed abandoned upon the declaration to that effect being filed. But in section 1244 the words "from the time" must have been used for some purpose and with the intention of preventing an instrument made by the husband alone during the existence of the homestead, and designed to affect it, from taking effect upon the abandonment of the homestead. By so construing those words, the three sections, taken together, erect a complete barrier around the homestead for the protection of it, in favor of the wife against the individual assaults of the husband upon it.

If, however, an abandonment under section 1244 would, as contended for by the appellants in this case, relate back to the time that the homestead was created, so as to render effectual any attempt of the husband alone to alienate or encumber it while it was a homestead, then the restrictions in sections 1242 and 1243 would be rendered nugatory. And the hus-

band would be enabled, if so disposed, to fraudulently destroy the homestead by first conveying it to a stranger without the knowledge of his wife, and then give vitality to his deed by obtaining her joinder in a declaration of abandonment upon some false pretext.

When Gleason took the deed embracing the homestead from Spray, the declaration of homestead, unaffected by any abandonment, stood of record; he was, therefore, charged with notice of the existence of the homestead. And as he took the deed embracing the homestead property without the signature and acknowledgment of Spray's wife, the deed as to such homestead property was void. It is, therefore, unnecessary to inquire whether the instrument was intended as a deed or mortgage.

The judgment and order appealed from should therefore be affirmed.

BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Rehearing denied.

HOMESTEAD. — A homestead cannot be conveyed by a deed executed by the husband alone, except in cases in which the grantee in such deed is the wife of the grantor: *Harsh* v. *Griffin*, 72 Iowa, 608; *Grupe* v. *Byers*, 73 Cal. 271; *Burkett* v. *Burkett*, 78 Id. 310; 12 Am. St. Rep. 58.

STATUTES IN PARI MATERIA are to be construed together as parts of one system: *Harrison* v. *State*, 22 Md. 468; 85 Am. Dec. 658, and cases cited in note.

[IN BANK.]

LEE CHUCK *v.* QUAN WO CHONG COMPANY.

[81 CALIFORNIA, 222.]

WRIT OF POSSESSION, WHAT CONSTITUTES EXECUTION OF, IN UNLAWFUL DETAINER. — In order to constitute a full execution of a writ of possession in an action of unlawful detainer, under the landlord and tenant act, the defendant and his property must be removed from the premises, and possession of the real estate given to the plaintiff, unless the removal of the personal property is in some way waived by the defendant. And if, before such removal is substantially completed, the judge directs a stay of proceedings upon appeal, and a bond is given in pursuance of the direction, the proceedings are stayed, and the defendant may remain in possession pending the appeal.

ORDER STAYING PROCEEDINGS CANNOT BE DISCHARGED WHEN. — When a judge has directed a stay of proceedings, and an undertaking on appeal

has been executed pursuant to his direction, the lower court has no further control over the matter, and cannot discharge the order staying proceedings after it has been complied with.

Stay Bond, Insufficiency of, Effect of. — A stay of proceedings is not affected by the fact that the bond first given thereon was insufficient because the sureties were not good, and that a new bond is afterwards given. If a bond be given at the proper time, and in due form, the proceedings shall be stayed, without reference to the sufficiency or insufficiency of the sureties, and if, after exception to the sureties, the same or other sureties justify within the time allowed, the stay will continue, and the liability of the new sureties will relate back to the time of the first stay.

Nunc pro Tunc Entry of Order Appealed from. — Where an order appealed from was actually made, but was not entered upon the record, the supreme court may grant leave to have the order entered *nunc pro tunc* and certified up.

Action for unlawful detainer. The opinion states the case.

Smith and Murasky, and James F. Smith, for the appellant.

Charles S. Wheeler, for the respondent.

Works, J. This was an action to recover the possession of certain real estate in the city of San Francisco, under the landlord and tenant act, and for the recovery of treble rents for its detention. Trial was had, and judgment rendered in favor of the plaintiff, and a writ of possession was duly issued and placed in the hands of the sheriff. The writ was partially executed, when application was made by the defendant, asking that the judge of the court direct that proceedings be stayed on his filing the necessary undertaking. The order was made and a bond was given, but the sheriff declined to stay proceedings, or to return the property that had been taken into possession by him to the defendant. The defendant then made application to the court for a rule upon the sheriff to show cause why further proceedings should not be stayed, and the property returned and restored to the defendant. The order to show cause was duly issued, and after a hearing, the court below discharged the rule, and declined to restore the defendant to possession. This appeal is from the last-named order, discharging the rule to show cause, and refusing to order the sheriff to restore the property to the defendant.

It is claimed, on the part of the defendant, that after the order directing a stay of proceedings upon the giving of a stay bond, and the due execution of such bond, the court below had no further power or jurisdiction in the matter, and

that the defendant was entitled, upon the execution of such bond, to the immediate restoration of the property. On the other hand, the plaintiff and respondent contends that, at the time the first order staying proceedings was made, and the bond executed, the writ of restitution had been fully executed, and the plaintiff put in possession of the property, and that for that reason the order upon the sheriff was inoperative, and that he could not restore the property to the defendant.

The main question, therefore, is, whether or not the writ of restitution had been fully executed at the time the first order for a stay of proceedings was given. In the answer of the plaintiff to the order to show cause why the proceedings should not be stayed, and the property be restored to the defendant, it was averred "that at the hour of eleven o'clock, or thereabouts, on said twenty-second day of December, 1888, the sheriff of the city and county of San Francisco fully executed said writ so far as the same required the delivery of the possession of said premises, by formally delivering over the possession thereof to plaintiff's agents, and that this plaintiff, by his agents, has held the continual and exclusive possession thereof ever since said time, and that he has refused, and still refuses, to allow the defendant to enter thereon; that after the sheriff had taken away from said premises a portion of the personal property levied upon, the order of this honorable court staying further proceedings was served upon said sheriff, or his deputy, and that thereafter, for the protection of said sheriff, and for the protection of said defendant, and for the protection of this plaintiff, this plaintiff granted permission to said sheriff to place one or more persons on said premises, whose business it should be to look after the personal property belonging to defendant thereon; that under the license of this plaintiff, granted as aforesaid, said sheriff has had one or more persons upon such premises in charge of said personal property, but that said persons claim no right whatever to the possession of the premises, and that this plaintiff is now, and ever since the delivery of the possession to him as aforesaid has been, in the exclusive possession thereof; that plaintiff's agent in charge of said property is not now, nor has he been at any time mentioned herein, in the employ of the sheriff's office; that the writ of possession issued upon plaintiff's judgment was fully executed upon the part of the sheriff prior to any stay of execution herein; that

plaintiff has obtained possession of said premises by virtue of his judgment herein, and in strict accordance with law, and if the defendant, through failure to obtain a stay of proceedings prior to the execution of plaintiff's writ, has suffered, it is not in the power of this court to relieve it from the consequences of its laches at the expense of plaintiff's rights."

It further appears, from the affidavit of one John O'Shea, that during all of the times mentioned he was in the employ of the sheriff of the city and county of San Francisco, and that he was in possession of the property, and was "then and there instructed by the sheriff that the possession of said premises had been surrendered to Lee Chuck, the plaintiff above named, and that said sheriff had no further right to the possession thereof; and that ever since that time he has been in charge of the personal property belonging to the defendant which is upon said premises; that he still continues to remain upon said premises, but that ever since the delivery thereof to plaintiff as aforesaid, he has remained thereon by the license of said plaintiff, and that at no time since has he, nor has any other agent or employee of said sheriff, been in possession of said premises, but that the said Lee Chuck ever since said time has continued in possession thereof."

The return of the sheriff, which was introduced in evidence, is as follows: "I hereby certify that in obedience to the writ of possession issued in the case of *Lee Chuck* v. *Quan Wo Chong and Company*, I did, on the twenty-second day of December, 1888, at eleven o'clock, A. M., cause the therein-named plaintiff to have quiet and peaceable possession of the premises therein described; that on the twenty-first day of December, 1888, under and by virtue of the said writ of possession, I levied upon certain personal property situate in said premises, and removed a portion of the same for safe-keeping to the warehouse of Davis, Haber, and Company, auctioneers, San Francisco, where the same will be sold at public auction, at sheriff's sale, to satisfy the judgment recovered by the plaintiff in the said action. The other portion of the personal property so levied upon I have not been able to remove, as while engaged in the act of removing, an order of this court commanding me to release the property so levied upon was served upon me, and I at once stayed all proceedings under said writ. This is a partial return only to the said writ, and is made under an order of court this day made and entered."

It appears from these proceedings that the premises in-

volved in this litigation were occupied and used by the defendant as a mercantile establishment, and the personal property therein was a stock of merchandise.

The return of the sheriff and other evidence clearly shows that at the time the first order staying execution of the writ was made and the stay bond executed, the sheriff had only taken out of the building so much of the personal property as was necessary to satisfy the money judgment recovered by the plaintiff, and that the balance of the property still remained in the building. There was the utmost expedition on the part of the attorney for the plaintiff to procure his writ and obtain possession of the property, and this was done before the defendant or its attorney had notice that the judgment had been rendered, and before an opportunity to procure an order directing a stay of proceeding and give the necessary bond was given. The sheriff defied the first order of the court, or, to say the least, disregarded it, and, either before or after the order was made, turned over to the plaintiff, nominally, not only the possession of the real estate, but of the defendant's stock of merchandise also. It is perfectly apparent, however, that this giving of possession was merely nominal, and with the hope of thereby showing a full execution of the writ. The misfortune of the showing is, that it appears that the sheriff never had in fact turned over the possession to the plaintiff. On the contrary, the property remained in the possession and under the control of the employee of the sheriff.

The fact relied upon, and stated in the affidavit of such employee, that he was there by the license of the plaintiff, does not seem to us to be a matter of any consequence.

In this class of cases, an appeal taken by the defendant does not stay proceedings, unless the judge before whom the case is tried so directs: Code Civ. Proc., sec. 1176.

In this case, the direction was given and the undertaking executed in pursuance of the direction of the judge, and in the amount fixed by him. When this was done, the proceedings were stayed precisely as in other cases. The judge of the court below having directed a stay, and the bond having been given, the court below had no further control over the matter. To allow the judge to give the necessary direction, and then after the defendant had complied with his order, and the appeal and stay had been perfected, to permit him without any statutory authority to change his mind and withdraw his direction or discharge such order, would lead to great uncer-

tainty, inconvenience, and in some cases, perhaps, to wrong and injustice.

In this case, it is claimed by the respondent that two bonds were given; that the first was insufficient, the sureties not being good; that these proceedings took place before the second bond was given; and that, as at the time the proceedings took place no sufficient bond had been given, there was no stay of proceedings, and that none existed until the second one was given. We do not so understand the law. Sections 941, 942, 943, 944, and 945 of the Code of Civil Procedure provide for undertakings on appeal in certain cases. Section 946 provides that whenever an appeal is perfected as provided in the preceding sections, proceedings shall be stayed. This must be so without reference to the sufficiency or insufficiency of the sureties. It is only necessary, under these sections, that a bond be given at the proper time and in due form.

If the sureties are insufficient pecuniarily, the opposite party has his remedy under section 948. He may, as provided in that section, except to the sureties at any time within thirty days after the filing of the undertaking. And unless they, or other sureties, justify as therein provided, within twenty days after the appellant has been served with notice of such exceptions, "execution of the judgment, order, or decree appealed from is no longer stayed." That is, the proceedings are stayed until the necessary exceptions are made, and time given for the sureties to justify, and no longer. It necessarily follows that if the same or other sureties do justify within the time allowed, the stay continues, and the liability of the new sureties relates back to the time of the first stay. So the fact that two bonds were given is immaterial. *Hill* v. *Finnigan*, 54 Cal. 494, is not against this construction of the statute. There the sureties failed to justify, and the appellant claimed the right to file a new undertaking in this court.

It only remains to consider whether the writ was fully executed at the time the stay took effect. We think it was not. In order to constitute a full execution of the writ, the defendant and its property must have been removed from the premises, and the possession of the real estate given to the plaintiff, unless the removal of the personal property was in some way waived by the defendant: Crocker on Sheriffs, sec. 554; Freeman on Executions, sec. 474; *Smith* v. *White*, 5 Dana, 376; *Witbeck* v. *Van Rensselaer*, 64 N. Y. 27.

The case of *Scott* v. *Richardson*, 2 B. Mon. 507, 38 Am. Dec.

170, is apparently in conflict with this well-settled rule; but in that case the goods were all removed from the dwelling-house, except a part of the household goods in the kitchen, which the sheriff intended to remove, but was prevented by an injunction. It was held that the sheriff having turned all the previous occupants out of the house, and put the plaintiff into it, and given him possession by words as well as acts, and having removed the goods of the previous occupants out of the dwelling-house, he had done all that was essential to the full execution of the writ, and his return to that effect was proper. This was, as we understand the decision, to hold, in effect, that all of the household goods being removed, except a small part in the kitchen, was a substantial execution of the writ. In this case the sheriff never turned the possession of the property over to the plaintiff. His return says he did; but the facts stated by him in his return, and the affidavit of the party he left in charge of the property, show clearly that he did not. The stock of goods remained on the premises, and the sheriff remained there in charge of them. It is true, it is claimed that the sheriff was not in possession of the real estate, but of the personal property; but the personal property being on the premises, and the sheriff there in possession and in charge of them, he was still, in contemplation of law, himself in possession with his writ unexecuted.

It is claimed by the respondent that the record does not contain any such order as the one appealed from. But the appellant has, with leave of this court, had an order, entered *nunc pro tunc*, certified up, which appears to be the proper order, and the fact that such an order was actually made is not controverted. We think this is sufficient.

The order appealed from is reversed, with instructions to the court below to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendant.

SERVICE OF WRIT OF POSSESSION OR RESTITUTION, AND WHAT THE OFFICER SHOULD DO TO MAKE THE SERVICE COMPLETE. — Crocker, speaking of the writ of possession, says: "Under this writ it is the duty of the sheriff to remove all persons from the premises described in the writ, and of which possession is to be given, and all goods and property that may be thereon, and to put the plaintiff into full and complete possession of the premises. The possession given by the sheriff is full and actual possession, and the writ is not fully executed until such possession has been given, and the plaintiff is left in the quiet possession of the premises": Crocker on Sheriffs, 2d ed., sec. 571; see also Bingham on Judgments and Executions, 252; 2 Freeman on Executions, 2d ed., sec. 474; *Gresham* v. *Thum*, 3 Met. (Ky.) 287; 77 Am. Dec. 174; *Newell*

v. *Whigham*, 102 N. Y. 20; *Keeler* v. *Keeler*, 102 Id. 30; *Farnsworth* v. *Fowler*, 1 Swan, 1; 55 Am. Dec. 718; *Upton* v. *Wells*, 1 Leon. 145; *Kingsdale* v. *Mann*, 6 Mod. 27. In the case of *Upton* v. *Wells*, *supra*, the sheriff returned upon the writ that in the execution thereof he took the plaintiff with him, and came to the house recovered, and removed thereout a woman and two children, which were all the persons which, upon diligent search, he could find in the house, and delivered to the plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after, three other persons, who were secretly lodged in the house, expulsed the plaintiff again; upon notice of which he returned to the house to put the plaintiff in full possession; but the other did resist him, so as without peril of his life and of them that were with him he could not do it. This was held to be no execution of the writ, and the court awarded a new writ and an attachment against the parties. In the case of *Gresham* v. *Thum*, *supra*, Stites, J., who delivered the opinion of the court, said: "But to satisfy the judgment there must be a thorough and complete execution of the writ. The delivery of possession thereunder must be effectual, and not merely formal. To turn out the defendant, and put in the plaintiff, under circumstances which indicate beyond reasonable doubt that the latter cannot remain in possession, even for a day, without imminent peril of great personal injury, or perhaps loss of life, but must, to avoid such hazard, immediately abandon the possession, and give way to the defendant, who stands ready to re-enter, and in point of fact does re-enter on the same day, is not, in our opinion, a complete and effectual execution of a writ. The delivery of possession under such circumstances is merely formal. It is, in fact, no satisfaction of the judgment, no execution of the writ." In *Farnsworth* v. *Fowler*, *supra*, it appeared that, in a former suit, Farnsworth had obtained a judgment against Fowler, awarding to the former a writ of possession for a house and a farm. Subsequently Fowler filed his bill in chancery, and obtained an injunction enjoining Farnsworth from taking possession of said premises in any manner, or causing a writ of possession on his said judgment to issue for the same. Two days after Farnsworth caused the writ of possession to issue, and placed it in the hands of an officer to be executed, who, on the same day, went upon the premises with Farnsworth and others, and was proceeding to execute the writ, when the sheriff arrived with the injunction, and served it on the parties. The officer had removed Fowler's family and effects from the dwelling-house into the yard, and was about to remove them off the premises, when any further action was arrested by the service of the injunction. He stated that he had placed Farnsworth in possession of the house, and Fowler's wife and children and his effects were remaining in the yard when the injunction was served, and that nothing further was done in the execution of the writ of possession. Fowler then endeavored to resume the possession of the house, when he was violently and forcibly resisted, beaten, and driven away by Farnsworth and others who were present acting with him. He then went with his family to a barn on the premises, where he remained about three months, Farnsworth retaining possession of the house. This was held not to be an execution of the writ of possession. Totten, J., who delivered the opinion of the court, said: "Was the writ of possession executed before the service of the injunction? Now, as to what is a legal and valid execution of a writ of *habere facias possessionem*, we may observe that it is the duty of the officer to deliver the full and actual possession of the premises recovered. And it is said that the process is not understood to be executed, nor the execution complete, until the officer is gone, and the plaintiff left in quiet possession. If the

tenant do not peaceably and quietly yield the possession to the plaintiff and consent thereto, it is the duty of the officer to remove him entirely off the premises, and it cannot be said that he has executed the writ until he has done so. In fact, it is the surest and best way so to remove the tenant that the plaintiff may have the exclusive and quiet possession to which he is entitled in virtue of his recovery. Now, in the present case, the possession was not yielded, but was contested and resisted, and yet the tenants remained on the premises, when the action of the officer was arrested by service of the injunction. Nor had the officer given possession of the entire premises recovered, but only of the house, which was a part thereof. In this respect, therefore, the writ was only in part executed. And when he had gone he left the tenants and the plaintiff on the premises contesting the right of possession, and neither party yielding, it resulted in strife and violence, which it is an important object of the writ to prevent or suppress. We are of opinion, therefore, that the writ of possession was not executed before the service of the injunction, or in other words, that in a legal and proper sense it was not executed at all."

In the case of *Newell* v. *Whigham*, *supra*, the deputy sheriff having the writ went to the premises, and notified the person in possession of his business; he did not enter the house on the premises, but reached in and took a chair and set it out, and went off. It did not appear that the chair was removed from the premises, and the family of the person in possession were and remained in the actual occupation. It did not appear that any person was put in possession on the part of the plaintiff, or that there was any attornment. The sheriff returned that he had executed the writ by delivering possession to the plaintiff. It was held that the evidence did not justify a finding that the writ had been executed. Rapallo, J., who delivered the opinion of the court, said: "The ordinary rule in regard to the execution of a writ of possession is, that the plaintiff must be put into full and complete possession; that the possession to be given by the sheriff is a full and actual possession, and that where the plaintiff is put into possession under circumstances plainly intimating that such possession is but formal and momentary, and he is accordingly ousted on the same day, such putting into possession is insufficient, and that the writ of possession will not be regarded as fully executed until the sheriff and his officers are gone, and the plaintiff is left in quiet possession."

An examination of the foregoing authorities shows what is necessary to constitute a valid and complete execution of a writ of possession. It is, however, a mistake to suppose that nothing short of an actual removal of the defendant or his property from the premises will constitute a complete execution of the writ. If the defendant, ceasing to hold in hostility to the plaintiff, yields up the possession to him, acquiesces in his title, and agrees to hold in subordination to it, this will be a good service of the writ, without an actual expulsion or removal: Freeman on Executions, sec. 474; *Smith* v. *White*, 5 Dana, 376; *Witbeck* v. *Van Rensselaer*, 64 N. Y. 27. In the latter case, the sheriff went on the premises with the plaintiff's assignee. The only person there at the time was the defendant's hired man. The sheriff demanded possession of him, and declared his intention of removing him. On this demand being made, the hired man signed a written surrender of the premises to the plaintiff's assignee, and an acknowledgment that he held them as tenant at will of plaintiff's assignee. The sheriff then went upon portions of the farm, and purported to deliver possession thereof to the assignee. This was held to be a sufficient execution of the writ of possession.

In the case of *Smith* v. *White*, *supra*, Ewing, J., who delivered the opinion of the court, in discussing this question, said: "The last instruction is based on the idea that nothing less than a positive expulsion, in fact, of the defendant from the whole premises will constitute a good execution of the writ. We cannot think so. A defendant may surely yield obedience to the process of the court, without being forcibly turned out, neck and heels. The object of the process is to obtain possession. If that be yielded up peaceably or tacitly, or expressly acknowledged to be in the plaintiffs, and they or their agent accepted it, that is surely sufficient without an expulsion in fact. The law requires nothing to be done that is useless or oppressive, when the ends of justice can be attained without it." And in *Scott* v. *Richardson*, 2 B. Mon. 507, 38 Am. Dec. 170, it was held that the execution of a writ of possession is sufficient if the sheriff's return shows that he turned the defendant out of the premises, and removed a portion of his goods therefrom, and by words and acts gave the plaintiff possession, although all of the defendant's goods were not removed. If the sheriff delivers possession of the premises to the plaintiff's agent, this will suffice; for the possession of the agent is in fact and in law the possession of his principal: Freeman on Executions, sec. 474; *Higginbotham* v. *Higginbotham*, 10 B. Mon. 369; *Kercheval* v. *Ambler*, 4 Dana, 166; 23 Am. Dec. 446; *Smith* v. *White*, 5 Dana, 376.

If the plaintiff is a co-tenant of the defendant, he should be put into possession of the premises jointly with the defendant, but not into possession of the entire premises to the exclusion of the defendant: *Ewald* v. *Corbett*, 32 Cal. 493; *Tevis* v. *Hicks*, 38 Id. 234; *Ash* v. *McGill*, 6 Whart. 391; *Dupont* v. *Ervin*, 2 Beav. 400.

The plaintiff is entitled to be put in possession of all improvements placed on the land that have become fixtures: *McMinn* v. *Mayes*, 4 Cal. 409; *Russell* v. *Blake*, 2 Pick. 507. Crops growing on the premises also belong to the demandant, and the sheriff should put him in possession thereof under the writ: *Huerstal* v. *Muir*, 64 Cal. 450; *Altes* v. *Hinckler*, 36 Ill. 275; 85 Am. Dec. 407; *King* v. *Fowler*, 14 Pick. 238; *Lane* v. *King*, 8 Wend. 584; 24 Am. Dec. 105; *Morgan* v. *Varick*, 8 Wend. 587; *Shepard* v. *Philbrick*, 2 Denio, 154; *McLean* v. *Bovee*, 24 Wis. 295; 1 Am. Rep. 185; *Doe* v. *Witherwick*, 3 Bing. 11; Adams on Ejectment, 347; Freeman on Executions, sec. 474. But the owner of lands, who has recovered a judgment in ejectment against persons occupying under a claim of title, is not entitled to the crops grown and harvested by such persons before the rendition of the judgment: *Page* v. *Fowler*, 39 Cal. 412; 2 Am. Rep. 462. The fact that land is covered by water will not prevent the sheriff from delivering possession under the writ. It is not necessary for him to drain off the water in order to make the delivery effective: Freeman on Executions, sec. 474; *Perrine* v. *Bergen*, 14 N. J. L. 355; 27 Am. Dec. 63.

If the sheriff, under the writ, deliver to the plaintiff possession of other land than that recovered in the action, the court below may correct the error: *Shaw* v. *Bayard*, 4 Pa. St. 257.

If the sheriff has begun to execute the writ at any time before it is returnable, he may complete the service after it is returnable, and retain the writ to indorse the service thereon. But if he has not begun to execute the writ before the time within which he was bound to return it, he cannot execute it thereafter: *Prescott* v. *Wright*, 6 Mass. 20.

Who may be Removed under Writ. — *Prima facie*, all parties entering on land after suit brought for its recovery are in possession in subordination to the defendant, and are equally liable to be removed under the writ against

him: *Ritchie* v. *Johnson*, 50 Ark. 551; 7 Am. St. Rep. 118; *Wattson* v. *Dowling*, 26 Cal. 124; *Leese* v. *Clark*, 29 Id. 664; *Wetherbee* v. *Dunn*, 36 Id. 147; 95 Am. Dec. 166; *McCreery* v. *Everding*, 54 Cal. 166; *Oetgen* v. *Ross*, 47 Ill. 142; 95 Am. Dec. 468; *Monongahela V. C. M. A.* v. *Patterson*, 96 Pa. St. 229; *Wallen* v. *Huff*, 3 Sneed, 82; 65 Am. Dec. 49; *Hall* v. *Dexter*, 3 Saw. 434; Freeman on Executions, sec. 475. In executing a writ of possession, the defendant and all the members of his family, together with his servants and tenants at will or sufferance, may be removed from the premises: *Satterlee* v. *Bliss*, 36 Cal. 489; *Saunders* v. *Webber*, 39 Id. 287; *Gray* v. *Nunan*, 63 Id. 220; *Huerstal* v. *Muir*, 64 Id. 450; *Mattox* v. *Helm*, 5 Litt. 186; 15 Am. Dec. 64; *Higginbotham* v. *Higginbotham*, 10 B. Mon. 372; *Fiske* v. *Chamberlin*, 103 Mass. 495; *Johnson* v. *Fullerton*, 44 Pa. St. 466; Freeman on Executions, sec. 475. In *Saunders* v. *Webber*, *supra*, it was held that a judgment against the husband, in an action of forcible entry and detainer, is sufficient authority to put out the wife or any member of his family. In *Gray* v. *Nunan*, *supra*, it was decided to be the duty of the sheriff under a writ of possession against the husband to dispossess the wife found in possession, notwithstanding she may have instituted divorce proceedings prior to the commencement of the action for possession, if her only claim to the property is such as she has by reason of her marital relations. In *Huerstal* v. *Muir*, *supra*, it was held that the wife of a defendant in ejectment against whom a judgment has been rendered, who was in possession of the premises at the date of the commencement of the action, will be presumed to be in possession under her husband, and may be evicted under the judgment. In *Fiske* v. *Chamberlin*, *supra*, it was held that an officer in executing a writ of possession is justified in removing from the premises the wife of the person against whom the judgment was rendered, upon which the writ issued, although she claims in her own right, if her claim is invalid. And in *Johnson* v. *Fullerton*, *supra*, it was held that the wife could not, by setting up title in herself, prevent the execution of the writ, for it was the duty of the husband to have defended his possession upon her title. "Notwithstanding this decision, we doubt whether a wife, or any other member of the defendant's family not a party to the suit, can lawfully be dispossessed of his or her separate estate, unless possession was acquired by them from the defendant after the institution of the action": Freeman on Executions, sec. 475, citing *Tevis* v. *Hicks*, 38 Cal. 241. In the recent case of *Bushong* v. *Rector*, 32 W. Va. 311, it was decided that a wife living with her husband on land which she claims as her separate estate, under a right derived from a person other than her husband prior to the commencement of the action, cannot be turned out of possession under a writ issued in an action of ejectment against her husband to which she was not a party; and that in such case she is as to her claim a person distinct from her husband, and must be made a party to the action, like any other person, in order to bind her by the judgment.

A purchaser *pendente lite* is bound by the judgment, and may be turned out under the writ: *Jones* v. *Chiles*, 2 Dana, 25; *Long* v. *Morton*, 2 A. K. Marsh. 39. So an assignee *pendente lite* is bound by the judgment, and may be dispossessed: *Howard* v. *Kennedy's Ex'rs*, 4 Ala. 592; 39 Am. Dec. 307. A judgment in ejectment binds all parties in privity with the defendant: *Sampson* v. *Ohleyer*, 22 Cal. 200; *Satterlee* v. *Bliss*, 36 Id. 489; *Hanson* v. *Armstrong*, 22 Ill. 442. And privies are those who enter under the defendant or in collusion with him: *Satterlee* v. *Bliss*, 36 Cal. 489. And where, pending a suit in ejectment against a tenant, he gives notice to his landlord, and the latter defends and is defeated, he may be dispossessed under the writ, although he was not a

party to the action: *Sampson* v. *Ohleyer*, 22 Cal. 200. But if the landlord is not made a party to the action, and has no notice of its pendency, he cannot be turned out, if chargeable with no fault or laches: *Oetgen* v. *Ross*, 47 Ill. 142; 95 Am. Dec. 468.

WHO CANNOT BE DISPOSSESSED UNDER WRIT. — Persons in possession of the premises anterior to the commencement of the action, claiming title, and who were not made parties to the action, and their tenants and agents, are not bound by the judgment, and cannot be turned out under the writ: *Howard* v. *Kennedy's Ex'rs*, 4 Ala. 592; 39 Am. Dec. 307; *Tevis* v. *Ellis*, 25 Cal. 515; *Calderwood* v. *Peyser*, 31 Id. 333; *Rogers* v. *Parish*, 35 Id. 127; *Ford* v. *Doyle*, 37 Id. 346; *South Beach L. A.* v. *Christy*, 41 Id. 501; *Irving* v. *Cunningham*, 77 Id. 52; *Powell* v. *Lawson*, 49 Ga. 290; *Kercheval* v. *Ambler*, 7 J. J. Marsh. 626; 23 Am. Dec. 446; *Clark* v. *Parkinson*, 10 Allen, 133; 87 Am. Dec. 628; *Garrison* v. *Savignac*, 25 Mo. 47; 69 Am. Dec. 448; *Goerges* v. *Hufschmidt*, 44 Mo. 179; *Monongahela V. C. M. A.* v. *Patterson*, 96 Pa. St. 469; *Hessel* v. *Fritz*, 124 Id. 229. Hoar, J., in delivering the opinion of the court in *Clark* v. *Parkinson*, 10 Allen, 133, 87 Am. Dec. 628, said: "We find that the text-books on the duties of sheriffs all state in general terms that in serving a writ of possession he should remove all persons from the premises; and the digests and *dicta* in reported cases undoubtedly contain a similar statement. . . . . In *Howe* v. *Butterfield*, 4 Cush. 305, 50 Am. Dec. 785, it was said by Mr. Justice Wilde that an officer was authorized and bound, for the purpose of delivering possession of a house, 'to remove from the possession all persons therein, and especially those claiming under the party against whom judgment had been recovered.' But all these expressions must be construed *secundum subjectam materiam*, and as referring to the tenant, or persons in privity with the tenant, or mere strangers or intruders. No case has been cited in which it was decided that one in possession before the commencement of the suit could be lawfully dispossessed upon an execution issuing upon a judgment in a suit between third persons." And in *Irving* v. *Cunningham*, 77 Cal. 52, it was held that persons in possession under a title adverse to that of all the parties to an action of ejectment, and who are neither parties nor privies to the action, cannot be dispossessed under the writ of possession, whether they entered before or after suit brought, if their entry was not under or by collusion with the defendant. See also *Mayo* v. *Sprout*, 45 Id. 99.

BARRETT *v.* MARKET STREET RAILWAY COMPANY.

[81 CALIFORNIA, 296.]

PASSENGER ON STREET-RAILROAD IS NOT BOUND TO TENDER EXACT FARE, but he must tender a reasonable sum, and if he does so, the carrier is bound to accept the tender, and furnish change to a reasonable amount.

TENDER OF FIVE-DOLLAR GOLD PIECE BY PASSENGER ON STREET-CAR, who has no smaller change with him, is a tender of a reasonable sum, and if he makes such tender he cannot be ejected for refusal to pay his fare.

DUTY OF STREET-RAILROAD COMPANY TO ACCEPT AND CARRY PASSENGERS must have a reasonable performance, and it is not in all cases reasonable for the carrier to demand the exact fare as a condition of carriage. It is immaterial, in such case, whether the fare is demanded in advance or

not, as the rule in regard to the performance of contracts has no necessary application.

DISTINCTION SHOULD BE MADE BETWEEN PASSENGERS ON STREET-RAILROADS AND THOSE ON STEAM RAILROADS in the matter of the tender of fare.

ACTION for damages. The opinion states the case.

W. H. L. Barnes, for the appellant.

Stanly, Stoney, and Hayes, for the respondent.

PATERSON, J. Action for damages for the forcible ejection of plaintiff from one of defendant's cars. The defense was, that the plaintiff had refused to pay his fare, and that therefore the defendant was justified in ejecting him. The trial court gave judgment for the plaintiff, and the defendant appeals upon the findings.

The material portions of the findings are as follows:—

"That while in said car as such passenger, and when said car was near the corner of Second and Market streets, the conductor in charge of said car, on behalf of the defendant, did, in the course of his employment as such conductor, demand of the plaintiff the payment of the sum of five cents, being the legal fare and cost of transportation on said car; that said plaintiff did not have in his possession any coin or currency of the exact value of five cents, or any coin of any smaller denomination than a five-dollar gold piece, lawful money of the United States, and plaintiff, in response to said demand of said conductor, offered said conductor a five-dollar gold piece, and told said conductor to take his, plaintiff's, fare out of said sum of five dollars; that the conductor refused to accept said five-dollar gold piece, informing the plaintiff that he was unable to make change for said five-dollar gold piece, and insisted upon the payment to him by the plaintiff of the exact sum of five cents, at the same time directing plaintiff if he did not produce and pay said sum of five cents to leave the car; that the plaintiff informed the conductor that the five-dollar gold piece was the smallest coin he had; that he was willing to pay his fare, but could not furnish the exact amount, and refused to leave the car upon the demand of the conductor; that thereupon the conductor stopped said car and called the driver to his assistance, and both of them thereupon seized the plaintiff, and against his protest, opposition, and struggles, forcibly ejected him from said car at the corner of said Second and Market streets, and in so doing inflicted upon plaintiff various bruises and injuries. . . . .

"And the court finds, from the foregoing facts alone, that the plaintiff did not refuse to pay fare for his transportation on said car, and did not insist upon any right, or supposed right, to be transported free of charge, under any circumstances or upon any condition, and that plaintiff was not ejected or put out of said car for a refusal to pay his fare.

"And as a conclusion of law, from the foregoing facts, the court finds that the plaintiff is entitled to judgment," etc.

It is stipulated by counsel "that if plaintiff were entitled to damages, five hundred dollars was a fair and just estimate thereof."

The question on the merits to which counsel have mainly directed their arguments is, whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time: Civ. Code, sec. 2187. And so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry": Id., sec. 2169. This duty, like every other which the law imposes, must have a reasonable performance. And we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that, on entering a street-car, a person should tender the sum of ten cents. Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was six and a quarter cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the

sum mentioned. The act of 1878 forbids him to "charge or collect a higher rate than five cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at four and a quarter cents. And in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a hundred-dollar bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business.

Section 2188 of the Civil Code provides that "a passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier." The question is, whether the findings show a refusal to pay,—whether the tender of a five-dollar gold piece was sufficient.

It is claimed by appellant that the establishment of the rule contended for by the respondent would lead to great inconvenience, and make it the duty of the carrier of persons for hire in street-cars to provide its conductors with sufficient small coin to do a general exchange business with all passengers, thus requiring the company to intrust to a class of employees who are usually of no pecuniary responsibility large sums of money. It is further said that if the tender of a five-dollar gold piece is a tender of the amount actually due, and the conductor is bound to receive it and return $4.95 to the passenger, the same principle would apply to the offer by the passenger of ten dollars or twenty dollars in gold or currency. With the question of convenience, however, we have nothing to do, except in so far as it bears upon the question whether the amount tendered was a reasonable sum, such as the carrier was bound to accept. It does not follow, if it be established as a rule that five dollars is a reasonable amount to be tendered to a conductor, that twenty dollars or fifty dollars is also a reasonable amount, and must be accepted. The fears of the

appellant are based upon the assumption that passengers generally will contumaciously, to avoid the payment of fare, and require the companies to carry them free, offer coin of a large denomination. But these fears, we think, can safely be set aside upon the theory that a question like this will, as is usual, settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well-known fact that the five-dollar gold piece is practically the lowest gold coin in use in this section of the country.

The case upon which the appellant relies—*Fulton* v. *Grand Trunk R. R. Co.*, 17 U. C. Q. B. 428—is not quite in point. In that case the plaintiff had boarded a train of cars without a ticket, and when asked for his fare declined paying it, as he said he had not made up his mind how far he should go. The conductor told him that he must decide, and afterward, on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a twenty-dollar gold piece, telling him to take his fare, $1.35, out of it. Under these circumstances, the court very properly held that the plaintiff had refused to pay his fare within the meaning of a statute very much like our own, and that the conductor was justified in refusing to carry him farther. The court said: "The general practice is for the passengers to pay at the office and get tickets; . . . . and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a twenty-dollar gold piece; for he relies upon receiving tickets from parties, or if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances." A distinction ought to be made, we think, between passengers traveling on steam-railroads and those traveling on street-railroads. Passengers of the former class are expected to prepare themselves with tickets, procured at the regular office established at the station where the trains regularly stop. Horse-cars and cable-cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing, expect to receive tickets for the passage.

Judgment and order affirmed.

CARRIER MUST CARRY A PASSENGER who complies with all reasonable rules adopted by the company: *Illinois etc. R. R. Co.* v. *Whittemore*, 43 Ill. 420; 92 AM. DEC. 138.

[IN BANK.]

PEOPLE EX REL. GRAVES v. McFADDEN. PEOPLE EX REL. GRAVES v. COUNTY OF ORANGE. PEOPLE EX REL. GRAVES v. COUNTY OF ORANGE.

[81 CALIFORNIA, 489.]

ACT SUBMITTING TO VOTE OF PEOPLE QUESTION OF CREATION OF NEW COUNTY IS CONSTITUTIONAL. — An act which provides for the formation of a new county out of a part of another county, upon the assent of two thirds of the qualified electors of the proposed new county voting at an election to be held for that purpose at a time fixed in the act, is constitutional, and is not a delegation of legislative authority.

LEGISLATURE HAS POWER TO PASS CONDITIONAL STATUTE, and to make its taking effect depend upon some subsequent event, and it may also provide within what time an act must be done, if done at all. Making certain provisions of an act to depend upon the vote of the people of a county does not delegate to the people the power to pass or repeal the act, which is a valid statute from the time of its passage and approval, and where the legislature itself provides that if the provisions of the act be not accepted within the period named therein, they shall not be thereafter carried into effect.

COUNTY IS NOT CORPORATION FOR MUNICIPAL PURPOSES within the meaning of section 6 of article 11 of the constitution of California, which provides that corporations for municipal purposes shall not be created by special laws. Counties, so far as they are to be regarded as corporations at all, are political corporations.

WHETHER GENERAL LAW CAN BE MADE APPLICABLE IS QUESTION OF FACT. — Whether or not a general law can be made applicable depends upon questions of fact, of which the legislature is the exclusive judge. The policy of creating a new county is one to be determined by the legislature in each instance when the proposition to do so is made, and if the determination be favorable, then the legislature alone must fix and determine the boundaries of such new county.

POWER OF LEGISLATURE TO ORGANIZE NEW COUNTY BY SPECIAL ACT. — The legislature has power to organize a new county by special act, and may make all special provisions that are incident to its complete organization, and that do not extend in their operation beyond the time when the organization shall become complete and subject to the operation of general laws; and it may classify every new county as it is organized, according to the best information at its command, until such time as it can fall into the line of classification prescribed by the general law. Whether special provisions which do not affect the validity of the whole act are constitutional or not will not be considered when the question under consideration relates only to the validity of the act as a whole.

CONSTITUTIONALITY OF ACT FOR ORGANIZATION OF ORANGE COUNTY. — The act for the organization of the county of Orange is not, as a whole, or in any matter that affects its general scope and purpose, in conflict with the constitution.

APPEAL from the superior court of Los Angeles County.

The opinion states the facts.

Chapman and Hendrick, and Gottschalk and Luckel, for the appellant.

Victor Montgomery, and Hutton and Swanwick, for the respondents.

FOX, J. All of these cases involve, so far as the merits are concerned, precisely the same questions, and are brought to accomplish the same end, and for the same relief; the three actions being brought to meet a doubtful question as to who were the proper parties defendant, under the circumstances, to an action brought for that purpose.

The cases are submitted together, ably argued on both sides, and a speedy determination desired upon the merits, regardless of the question of parties. The three cases cover all the possible necessary parties, and we shall proceed to consider the merits of the case as if it were but a single case, and not attempt to discuss the question as to who were necessary or proper parties.

The real question is, whether the act of the legislature of the state of California, approved March 11, 1889, entitled "An act to create the county of Orange, to define the boundaries thereof, to determine the county seat by an election, and to provide for its organization and election of officers, and to classify said county" (Stats. 1889, p. 123), is constitutional or not.

In each case demurrer to the complaint on the merits was sustained, and judgment of dismissal entered, from which plaintiff appeals.

1. The first point made by appellant is, that the act is a delegation of legislative authority, and is therefore void.

The first section of the act provides that "upon the assent of two thirds of the qualified electors voting at an election to be held for that purpose, as provided in sections 4 and 5 of this act, there shall be formed out of the southeast part of Los Angeles County a new county, to be known as the county of Orange, which shall rank as a county of the fifteenth class until the census of 1890 is taken, and a new apportionment is had." The second section defines the boundaries; the third provides that the county seat shall be chosen as thereinafter provided; and the fourth provides for the appointment of commissioners, to be appointed by the governor, whose duty it should be, after qualifying, and on a day named in the section, to order a special election to be held within the boun-

daries so fixed for the new county, upon a day also named in the act, at which the electors should determine by ballot whether or not said territory should be organized as a new county under the act,—the act itself adopting, for the purposes of that election, the election precincts within the territory, as the same had been established by the board of supervisors of Los Angeles County, of which it was then a part,—the commissioners to canvass the returns and declare the result. If two thirds of the qualified electors voting at such election vote in favor of the creation of the proposed county, then said commissioners are to divide the county into a convenient number of judicial townships, road and school districts, define their boundaries, and designate the name of each. They are also to establish election precincts, and give thirty days' notice by publication of the precincts established, designating the names and boundaries thereof; and also to divide the county into five supervisor districts, and give a like notice of the names and boundaries thereof; and they and their president and secretary are authorized and required by law to discharge the same duties as are required of boards of supervisors and county clerks, so far as the same apply to holding elections, canvassing returns, and issuing certificates of election. Within a period not exceeding six months from the first meeting of the commissioners, they are to order an election in said county for the election of county officers, and the selection of a county seat. They are to keep a record of all their proceedings, and of the result of both elections, transmitting a certified copy thereof to the secretary of state, and filing the original in the office of the county clerk as soon as that officer shall have been elected and qualified; and thereupon the duties of said commissioners shall cease and terminate. If, however, at said first-named election "less than two thirds of the qualified electors voting for and against the creation of the proposed county vote for the creation of said county, then this act shall cease to be of any force or effect." Other provisions of the act may be hereafter noted, but are not material to the point now under consideration, except, perhaps, the concluding sentence of the act, which reads: "This act shall take effect and be in force from and after the date of its passage and approval."

The proposition is not disputed that the legislature has no power to delegate its legislative authority; but the question turns upon whether this is a delegation of such authority or

not. Counsel for appellant has cited several authorities in support of that contention, among them *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, but they do not strike us as being in point. In *Ex parte Wall*, *supra*, and *State* v. *Weir*, 33 Iowa, 134, 11 Am. Rep. 115, the real question was, whether the legislature could authorize the people of a given locality to suspend the operation, within such locality, of a general penal statute of the state, and the court held that it could not do so. The other case cited was similar in character. While there is a wide diversity of opinion in the reported cases as to what questions the legislature may, and what it may not, submit to the arbitrament of the people, we think it will rarely be found that the submission of a question like that submitted by the act now under consideration to a vote of the people has been held to be a delegation of legislative authority.

Mr. Cooley, in his work on Constitutional Limitations, in discussing this subject (pp. 141 et seq., 4th ed.), after laying down the rule in very strong language that the power conferred upon the legislature to make laws cannot be delegatad by that department to any other body or authority, and citing many cases in support of it, adds: "But it is not always essential that a legislative act should be a completed statute which must in any event take effect as a law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not, at their option." After citing as illustrations the cases of private and municipal corporations, he proceeds (p. 144): "For the like reasons, the questions whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited, or a city charter be revised, or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts or engage in a particular improvement, is always a question which may with propriety be referred to the voters of the municipality for decision."

This principle was adopted by this court in the case of *Upham* v. *Supervisors of Sutter County*, 8 Cal. 378, where it was held that, while the legislature cannot delegate its legislative powers, it can delegate the power to the voters of a county to select a county seat therein; and also in *People* v. *Burr*, 13 Id.

343, where the legislature had passed an act authorizing the issue of certain bonds, unless, upon petition duly filed, and at an election thereupon held, the people of San Francisco should vote against the issuance of such bonds. Of like effect is the decision in *Robinson* v. *Bidwell*, 22 Cal. 379, where the court held that the vote of the people, under an act providing therefor, upon a proposition to issue bonds, and where the bonds were to be issued or not, according as the majority of the votes should determine, was not an act of legislation, but simply an event, upon the happening of which the law is to take effect. See also *Hobart* v. *Supervisors of Butte County*, 17 Id. 23.

In the case of *People* v. *Nally*, 49 Cal. 478, this court held that an act which submits to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and provides that if the majority of the votes are for annexation, then the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed, in part to the county in which the vote is taken and in part to another adjoining county, was not unconstitutional.

On the authority of that case the ruling of the court below in this case, as to the point now under consideration, should be affirmed. But we may add to the reasoning given in the case referred to, that the act here under discussion is, in its nature and effect, an enabling act; and as such it was full and complete, as an act of legislation, when it received the approval of the governor. Its purpose was to enable the people resident within the territory described in the act to segregate themselves from the county of Los Angeles, and to erect and maintain for themselves a county government. No doubt the legislature had the power to create a new county without submitting the question to a vote of the people, as Congress had the power to admit California into the Union without an enabling act; but as the burdens of the new local government were to be mainly borne by the people within the territory, it was, in the language of Mr. Cooley, "with propriety referred to the voters for decision," and they were permitted, and by pursuing the course prescribed by the terms of the act enabled, to assume the position of a county in the state, and the burdens of a county government, or not, as they should elect; just as four states were at about the same time permitted and enabled to assume the position and burdens of states in the Union, or not, as the people thereof respectively should at the polls decide.

But it is further claimed that if the act does not delegate to the people the power to create the law, it does delegate to them the power to repeal it, by reason of the sentence: "If, at such election, less than two thirds of the qualified electors voting for and against the creation of the proposed county vote for the creation of said county, then this act shall cease to be of any force or effect"; and that by reason thereof the whole act is void. If the effect of this sentence was, as claimed, to delegate to the people the power to repeal the act, a complete and perfect answer to the objection would be that the sentence might be stricken out entire without affecting any other portion of the act. This being so, the presence of this sentence does not render the whole act void: *Robinson* v. *Bidwell*, 22 Cal. 379; *People* v. *Nally*, 49 Id. 478; *Ex parte Frazer*, 54 Id. 94. But we do not think that such was the force or effect of this clause. The law was complete and in force the moment it was approved by the governor. It provided for different steps and stages of proceedings in carrying it into effect. One of its provisions was, that when it had reached a certain stage in those proceedings, which stage must be reached within a time limited by the legislature, the further proceeding under it should depend upon the happening of an event which might or might not happen, to wit, the favorable vote of the electors. If that event or contingency happened, then all the remaining provisions of the act were to be carried into effect; and this, too, was to be done within a time limited by the act. If the event did not happen, then by its own terms no further provisions of the act were to be carried into effect.

Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all; and it may have been a wise provision, in view of the rapid changes taking place in the conditions of the surrounding country and the numbers of its people, to say to them, If you do not choose to accept the permission granted by the provisions of this act within the time herein named, it shall not remain an open permit, to be accepted at any future time. It may very well be that the legislature was willing to create a new county, located and bounded as proposed in the act, at that time, and not be willing or deem it wise to create one in the same locality or with the same boundaries two or four years hence. Conditions may so change that in the early future two or more new counties may be

needed in that part of the state, or on the other hand, it may not be desirable then to make any change. Whatever may have been the reason which moved the legislature thereto, it did not delegate to the people the power to repeal the act, but itself said that if the provisions of the act were not accepted within the period named, they should not thereafter be carried into effect.

2. Another point made is, that the act is in violation of section 6, article 11, of the constitution, which provides that corporations for municipal purposes shall not be created by special laws.

This point does not seem to be very seriously insisted upon in argument, but it is proper to notice it. It is sufficient to say of it that it is easily deducible from the constitution itself, that a county is not a "corporation for municipal purposes" within the meaning of the section referred to. Article 11 is on the subject of "cities, counties, and towns." The first five sections relate entirely to the organization and management of county governments; the first section giving to them a designation different from that of "municipal corporations." It reads: "The several counties, as they now exist, are hereby recognized as legal subdivisions of this state." With the sixth section commence the provisions in reference to municipal corporations, and it and the two following sections are devoted exclusively to that subject, having nothing in them relating to counties or county government. So also with section 19. Sections 9 to 14, inclusive, and sections 16, 17, and 18, relate to subjects which are common to both counties and cities and towns, and every time that either is mentioned the three are mentioned by name, and not as organizations of a single class, as "municipalities" or "municipal corporations." Section 15 clearly defines the distinction between the two as classes. It reads: "Private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation."

It is clear, therefore, that the constitution does not hold counties to be municipal corporations, or "corporations for municipal purposes"; but so far as they are to be regarded as corporations at all, they are "political corporations." And this is in harmony with the common acceptation of the terms "municipality" or "municipal corporation," as used in the common and written law of both England and America time out of mind. This view is also in harmony with those pro-

visions of the statutes and codes which define counties to be "bodies politic and corporate," and also with the decision of this court, made before the adoption of the constitution, when it declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code: *People* v. *Sacramento County*, 45 Cal. 695. It was also so understood by the framers of the constitution, as shown by the debates in convention: See vol. 2, p. 1050, and vol. 3, pp. 1482, 1483, 1502, 1509.

3. It is also claimed that the act is void, because it is in conflict with or passed in violation of article 4, section 25, subdivision 33, of the constitution, wherein it is provided that "the legislature shall not pass local or special laws . . . . in cases where a general law can be made applicable."

This point is not well taken. While it may be found practicable, and the legislature has already endeavored by a single act to provide a uniform system of county government, we can hardly conceive it possible, in view of the varied conditions of the different localities in this state, if indeed it could be done in any state, to frame a single law which should meet the necessities of each attempt to organize a new "political subdivision of the state." In any event, whether such a law could "be made applicable" depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature. The policy of adding to the number of the "political subdivisions of the state" is one to be determined by the legislative department of the government in each instance when the proposition to do so is made; and if the determination be favorable, then the legislative department alone must fix and determine the boundaries of such subdivision.

4. Appellant claims that several distinct and separate provisions of the act are in conflict with distinct and separate subdivisions of section 25, article 4, of the constitution, prohibiting local and special legislation on specific subjects, and that as to each of those provisions it is unconstitutional and void; as in the provision defining the duties of the commissioners, giving them the power to create supervisor, school, and road districts, and election precincts, and to exercise the powers conferred upon boards of supervisors in the matter of calling elections, canvassing the returns, and the like; the provision classifying the county; the one consolidating certain

offices; the one providing for the transfer to the new county, when organized, of certain causes which may be then pending in the courts of the county of Los Angeles; and perhaps some others.

It would extend this opinion beyond any limit of necessity to discuss each of these objections separately. By the very terms of the act these provisions relate to the mere incidents of the organization of the county, and provide for acts which must be done in order to complete the organization and preserve the orderly and harmonious administration of the government and the laws. None of them extend in their operation beyond the time when the organization shall have become complete, and the subject-matters of its jurisdistion under the general laws shall have been brought and placed under its control, except, it may be, the single one of the classification of the county, and that extends, as does the classification already made of all the other counties, only until the taking of the next census and the readjustment of representation. It was and is the duty of the legislature to classify all the counties, and for this purpose it may classify them by population. Const., art. 11, sec. 5. It had done this as to all the other counties; and it must necessarily classify every new county as it is organized, according to the best information at its command, until such time as the new county can fall into the line of classification prescribed by the general law. It did so classify this one, the classification to remain in force until, and only until, a readjustment of the classification of all the counties will take place under the provisions of the general law on that subject. We have no doubt of the authority of the legislature to do this; and as to the objections of a like character made to other separate provisions of the act we may say, the legislature, having the power to create and organize a new county, had power and authority to adopt the measures necessary to its complete organization, and to the bringing and placing of the subject-matters of the jurisdiction of its courts or officers under their control; and all this might be done by the same act: these things were germane to the main object of the bill. Unless the validity of the whole act depends upon the constitutionality of one or more of these provisions of detail for the organization, the court ought not in this action to express an opinion as to the constitutionality of these separate provisions. It will be time enough to pass upon those provisions when some right dependent upon the disputed provision

is brought before the court for adjudication: *Brooks* v. *Fischer*, 79 Cal. 173.

No one of them that is now questioned seems to be so blended with the general scope and purpose of the act as a whole as to affect the validity of the whole act, or any other of its provisions; therefore its invalidity (if it should be invalid) would not defeat the general scope and purpose of the act. As to the objection made to the provisions in regard to the holding of the elections, the manner of conducting them, and designating the places of voting, the constitution itself expressly excepts the case of the organization of new counties from the inhibition against local and special legislation: Art. 4, sec. 25, subd. 11. And here it may be remarked that this very exception shows that the framers of the constitution recognized the probable necessity of legislation which might be denominated local or special in cases of the organization of new counties.

But it is contended that the court ought now to determine the question of the constitutionality of these separate provisions to which attention is called, and of each of them, even if they do not go to the merits of the whole act, and if any of them be found to be unconstitutional, then to consider and determine the question of whether or not the people would have been likely to have accepted the provisions of the act as a whole, and perfected an organization under it, if the provisions so found to be unconstitutional had been omitted from it. This is inviting the court to enter a field of pure conjecture, and upon a speculation as to probabilities in which we cannot indulge. All that we need to say here is, and that we do say, that the vote of the people was not an act of legislation, and that the act for the organization of the county of Orange is not, as a whole, or in any matter which affects its general scope and purpose, in conflict with the constitution.

The judgment appealed from is affirmed in each case.

STATUTES. — It is the province of the legislature to decide upon the expediency of an act, and the question cannot be reviewed by the courts: *People* v. *Fleming*, 10 Col. 553. So it is the province of the legislature, not of the courts, to decide whether a statute violates a provision of the constitution providing that a special law must not be enacted, when a general law could be passed to effect the desired result: *Evansville* v. *State*, 118 Ind. 426. The legislature has power to pass special acts for special purposes without infringing upon the operation of other general laws: *Brodhead* v. *Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; compare *Allen* v. *Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707, and note as to statutes of local application.

[IN BANK.]

HUMPHREYS *v.* HOPKINS.

[81 CALIFORNIA, 551.]

ATTACHMENT OF PROPERTY IN CUSTODY OF FOREIGN RECEIVER. —A receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation and carry on its business, and who in pursuance of his authority as such receiver has taken the property into his actual possession, within the jurisdiction of the court by which he was appointed, cannot hold such property against the claim of a citizen of California, who, upon finding the property in that state, has, in pursuance of its laws, caused it to be attached as security for his just demands against the railway company.

REPLEVIN BY FOREIGN RECEIVER. — A receiver appointed by the court of another state, for the benefit of creditors there, can only sue in this state, as such receiver, on the ground of comity; and the principle of comity will not be so far extended as to sustain a suit by him to replevy property of the debtor which has been attached in this state by a creditor residing therein, notwithstanding the property when attached was in the actual possession of the receiver, and had been brought by him from the state where he was appointed.

ACTION for the recovery of personal property. The opinion states the case.

Frank M. Stone, for the appellant.

T. Z. Blakeman, for the respondents.

BEATTY, C. J. The plaintiffs in this action are receivers of the road and other property of the Wabash, St. Louis, and Pacific Railway Company. They were appointed by the United States circuit court for the eastern district of Missouri, May 25, 1884, by an order made in an action to which the railway company was a party, and were thereby authorized to take possession of said road, to manage, control, and operate it, and preserve and protect all its property. At the date of their appointment a certain freight-car belonging to the company was at Toledo, in the state of Ohio, where, on the 29th of May, 1884, it came into their possession. It was subsequently brought by them in the course of their business as receivers to the city of St. Louis, in the state of Missouri, a place within the jurisdiction of the court by which they were appointed. On the 16th of March, 1885, they loaded the car with freight consigned to San Francisco, intending that when the freight was unloaded at San Francisco the car should be returned to St. Louis. While the car was in San Francisco it was attached by the defendant, as sheriff of San Francisco, in a suit brought by Henry Payot and Isaac Upham against the

railway company. Payot and Upham were citizens of California, resident and doing business in San Francisco.

This action was thereupon commenced by the plaintiffs to recover the car so attached. The judgment of the superior court was in their favor. Defendant appeals.

The question presented by the appeal is, whether a receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation and carry on its business, and who in pursuance of his authority as such receiver has taken the property into his actual possession within the jurisdiction of the court by which he was appointed, can hold such property against the claim of a citizen of this state, who, upon finding the property here, has, in pursuance of our laws, caused it to be attached as security for his just demands against the railway company.

Counsel for appellant contends for the proposition that a foreign receiver has no capacity to sue in his official character in our courts, but we do not understand the authorities to sustain this extreme view. The question, however, need not be decided in this case, for the plaintiffs, besides being receivers of the road, had an actual and lawful possession of the property at the time of its seizure, and by virtue of that possession could undoubtedly have recovered it from a mere trespasser.

But their mere possession of the property of a foreign debtor cannot be held to exempt it from the claims of attaching creditors. A debtor cannot, by placing or allowing his property to be in the possession of a third party, screen it from attachment. However lawful the possession of the bailee, the property is still subject to attachment or garnishment at the suit of a creditor of the owner. Such rights as the bailee may have to the use or possession of the property, and such liens as he may have upon it, will of course be protected, but, saving the rights of the bailee, the creditor may take it.

The question in such cases, therefore, is not as to the lawfulness of the bailee's possession, or his right to recover the property from a mere trespasser: it is a question as to which right is superior,— his or the attaching creditor's.

And such is the question here. Conceding, as we think must be conceded, that these plaintiffs could have recovered the car in controversy from a mere wrong-doer by virtue of their lawful possession at the date of the seizure, if not by virtue of their office, still it remains to be decided whether they could reclaim it from the defendant, who justifies under a writ of

attachment issued at the suit of citizens of the state of California to enforce a just demand against the owner of the property.

The solution of this question depends upon the effect to be given to the order of the court of Missouri, under whose appointment the plaintiffs are acting.

For, we repeat, the mere possession by the plaintiffs of the debtor's property, however lawful, does not screen it from attachment. To show a right superior to that of creditors, they must fall back upon the order appointing them receivers, and must depend upon the comity of this state as to the effect to be allowed that order.

The substance of that order has been already stated. It does not pretend to vest the title to the property of the railroad company in the receivers; it merely directs them to take possession of and use the property for the benefit presumably of creditors of the company who have resorted to that particular forum for the enforcement of their debts.

The authorities as to the effect to be given in other jurisdictions to such orders are collected in a note to the case of *Alley* v. *Caspari*, 6 Am. St. Rep. 185. The result is summed up by the editor (p. 189) as follows: "We deduce, therefore, from a thorough examination of the cases and text-books upon the subject, that the great weight of authority is, and should be, in keeping with the decision rendered by Mr. Justice Wayne in *Booth* v. *Clark*, 17 How. 334, that a foreign receiver has no right to sue in another state; but that, on the ground of comity, the court will, in a just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice where the good of a large number would demand it, by recognizing the orders and judgments of the courts of a sister state. But in none of the cases is such right to sue conceded, or the suit permitted to be maintained by the foreign receiver, where the claim sought to be enforced conflicts with the rights of citizens or creditors in the state where the suit is brought."

We think that the effect of the decisions is correctly stated in this extract from Mr. Freeman's note, and we think that in this case justice to our own citizens requires that we should not extend the principle of comity so far as to award this property to the representatives of creditors residing in other states, and who are seeking to hold it for their own exclusive benefit.

The judgment and order appealed from are reversed, and cause remanded.

THORNTON, J., delivered a dissenting opinion, of which the following is a synopsis: It is argued that the plaintiffs, suing as receivers, cannot maintain this action, inasmuch as a receiver cannot maintain an action out of the jurisdiction of the court which appointed him. Conceding this to be the general rule, still the plaintiffs can maintain this action. The right to sue is founded on the possession of the car delivered to the plaintiffs, as receivers, by the company, at Toledo, and its being taken from that place by the plaintiffs, in their management and carrying on of the business of the company, to St. Louis, where it was loaded and sent to San Francisco. This possession was given in pursuance of the order of the court, and was never afterward disturbed by the company. It remained in the receivers unchanged until the car was attached in this state. During the period of this possession, the plaintiffs, without challenge, used this car in carrying on the business of the railroad company. This continued possession was lawful, and vested in them, as individuals, a special property, on which they can, as individuals, maintain this action. This conclusion is supported on principle and by authority: *Chicago etc. R. R. Co.* v. *Keokuk Northern Line Packet Co.*, 108 Ill. 317; 48 Am. Rep. 557; *Cagill* v. *Wooldridge*, 8 Baxt. 580; 35 Am. Rep. 716; *Pond* v. *Cooke*, 45 Conn. 126; 29 Am. Rep. 668; *McAlpin* v. *Jones*, 10 La. Ann. 562; *Hurd* v. *City of Elizabeth*, 41 N. J. L. 1.

The property sued for in this case was in the possession of the receivers within the jurisdiction of the court appointing them. They got their possession in Ohio by delivery from the owner, and took the car to St. Louis, where it was within the jurisdiction of the circuit court of the United States for the eastern district of Missouri. The fact that they got possession of the car out of the jurisdiction of the appointing court cannot make any material difference, when the property was at once carried into such jurisdiction, and therein retained in their possession. It cannot affect the right of the plaintiffs to recover that the car was afterwards sent by them, in the course of their duty, and in the prosecution of the business which they were appointed to carry on: *Chicago etc. R. R. Co.* v. *Keokuk Northern Line Packet Co.*, 108 Ill. 323; 48 Am. Rep. 557. In the same line of decision are *Low* v. *Burrows*, 12 Cal. 188, and *Lewis* v. *Adams*, 70 Id. 403, 59 Am. Rep. 423; and also *Wilkinson* v. *Culver*, 25 Fed. Rep. 639, where a judgment was recovered by a receiver of a corporation appointed by a New Jersey court, and the receiver, as owner of the judgment in his individual capacity, was allowed to recover on it in an action brought in the United States circuit court for the southern district of New York. See also *Biddle* v. *Wilkins*, 1 Pet. 686; *Talmage* v. *Chapel*, 16 Mass. 71; *Trecothick* v. *Austin*, 4 Mass. 34, 35; *Barker* v. *Higgins*, 41 Md. 539; *Cherry* v. *Speight*, 28 Tex. 503; *Rucks* v. *Taylor*, 49 Miss. 552; *Morton* v. *Hatch*, 54 Mo. 408; Story on Conflict of Laws, secs. 516, 517. The cases above referred to are all governed by the rule that a title to personal property once vested and duly acquired by the *lex rei sitæ* will be deemed valid, and be respected as a lawful and perfect title in every other country: Id., sec. 884. There is nothing in the foregoing in conflict with what is laid down in *Booth* v. *Clark*, 17 How. 322. The action in that case was attempted to be maintained in the circuit court for the district of Columbia, on the mere order of a chancery court of the state of New York appointing a receiver. The receiver so appointed failed to show that he had ever had possession of the claim or the evidences of the claim the proceeds of which he sought to recover. On the contrary, the claim had always been in the possession of another. The court dwells on the delay of the receiver to take steps to get possession of this claim as a material fact in the case. *Booth* v. *Clark*, *supra*, was properly

characterized in *Hazard* v. *Durant*, 19 Fed. Rep. 477, as an action by a receiver, a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment. It may well be conceded that such an officer, on such a showing of title, cannot recover in a foreign jurisdiction. If the receiver in *Booth* v. *Clark*, *supra*, had, after his appointment, got possession of the claim prior to its coming to the hands of Clark's assignee in bankruptcy, and this had been shown, the court would, no doubt, in accordance with the principle of its rule laid down in *Biddle* v. *Wilkins*, 1 Pet. 686, have held in favor of Booth, who would then have shown an individual and personal right to recover. The cases which follow *Booth* v. *Clark*, *supra*, are like it in the material feature above pointed out. In all these cases the receiver relied on his order of appointment merely to recover. If this court sanctions the contention of plaintiffs' counsel, it will authorize the taking of property from the hands of a court having ample jurisdiction, which had, through the agency of a receiver (its own instrument), gotten lawful possession of property, and whose possession was lawful, when this property was attached here.

The statements made in the note referred to in the prevailing opinion relate merely to a suit by a receiver in a foreign jurisdiction, where he had never reduced the property to possession, and relies solely on the order of appointment to recover. A careful perusal of the note will make this evident. It cites no case which holds that a receiver, after he has reduced the property of the litigant to possession, and it is taken from him, cannot sue for it in any jurisdiction where he can find it. The title vests in the receiver when he has reduced the property to possession, and on this title he can recover. The title thus vested gives him a right to recover in the courts of every civilized country, not as a matter of comity, but of right. No court has a right to take the property of one person and give it to another, or have it sold for the benefit of another. Considerations of comity only arise where the receiver sues in a foreign jurisdiction on the mere order of appointment. Comity allows such suit where there is no legal policy that forbids it. Such a case is *Hurd* v. *Elizabeth*, 41 N. J. L. 1.

The special property vested in the receiver gives him a title on which he can recover anywhere. A sheriff gets only a special property where he has levied an execution, and on such title he can sue and recover anywhere. The title of the receiver vested when he reduced this car to possession by the consent of the corporation. He then sent it out of the state of Missouri for a lawful purpose. Why has a creditor a right to attach it? It was not, when attached, the property of the corporation, but of the receiver of the court, of which the receiver is the hand and instrument. A creditor cannot attach the property of one person to pay a debt due him by another. The statement in the complaint that the plaintiffs were appointed receivers by the court in Missouri shows the origin of their right; but it is further alleged that the plaintiffs took possession of the car, and held it until such possession was interfered with by the defendant. The plaintiffs count specially on their own possession, and there is nothing to prevent them from recovering on their individual rights. The averment as to their being receivers may be regarded as *descriptio personæ*, and may be rejected as surplusage, in accordance with the rule laid down in *Lewis* v. *Adams*, 70 Cal. 411, 412; 559 Am. Rep. 423. The judgment and order should be affirmed. McFarland, J., also dissented, and concurred with most of the views expressed in the dissenting opinion of Mr. Justice Thornton.

Our note to *Alley* v. *Caspari*, 6 Am. St. Rep. 179–190, was referred to and relied upon both in the prevailing and in the dissenting opinion in the principal case. We trust that this will not be regarded as sufficient to convict us either of ambiguity or of self-contradiction in what was said in that note. We there undertook to state the general rule controlling actions by receivers brought in courts other than those of the state in which they were appointed, but we also stated the qualifications of that rule now recognized by the vast majority of the courts which have considered it; and while we stated the general rule as it is quoted in the prevailing opinion, we have no doubt that we also showed that qualifications of it had been recognized, and that those qualifications were such as were relied upon by Judge Thornton in his dissenting opinion; and as between the dissenting and the prevailing opinion in the principal case, we doubt not that the former more correctly represents the law upon the subject as it is now generally recognized in the United States.

The error, as we conceive it, in the prevailing opinion is in assuming that the claim sought to be enforced conflicts with the rights of citizens and creditors of the state in which the suit was brought. The property in controversy had never been in the state of California, so far as the record shows, until it was brought there by the receiver in the discharge of his duties as such. It was in another jurisdiction when the receiver was appointed. Pursuant to the order of the court, and by virtue of his rights as receiver, he had taken possession of the property. The creditors in California had no especial rights with regard to that property; they could not have attached it, or levied any other writ upon it, in the state of California, because it was not and never had been within the reach of any process which could issue in that state; and it cannot be truly asserted that if the court in the principal case had sustained the claim of the receiver that the California creditors would have been in any worse position than if such receiver had never been appointed or had never taken possession of the property in controversy.

By the appointment of the receiver and his taking possession of the property, it was placed in custody of the law, and as the California creditors had no means of enforcing their claims against the property before it was taken into such custody, they were not injured thereby, and there was no sufficient reason for refusing to aid the court out of whose possession the property was taken to regain such possession. The general rule and the limitation of it applicable to this case were, in our judgment, correctly stated by the supreme court of Illinois in the following language: "The general doctrine that the powers of a receiver are co-extensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors residing in another state, to remove from such state the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede, and were this the case of property situate in this state, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the fact that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of the opinion that by the

receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as a receiver, and to meet such liability he might maintain any appropriate proceeding to regain possession of the barge which had been taken from him: *Boyle* v. *Townes*, 9 Leigh, 158; *Singerly* v. *Fox*, 75 Pa. St. 114. It is well settled that a sheriff does by the seizure of goods in execution acquire a special property in them, and that he may maintain trespass, trover, or replevin for them": *Chicago, M., & St. P. R'y* v. *Keokuk*, 108 Ill. 317; 48 Am. Rep. 557; *Cagill* v. *Wooldridge*, 8 Baxt. 580; 35 Am. Rep. 716; *Pond* v. *Cooke*, 45 Conn. 126; 29 Am. Rep. 668.

It will be observed that the legitimate consequence of the application of the rule supported by the prevailing opinion in the principal case is the substantial denial of the right of the courts to appoint receivers of the property of railways and of other property, which, in its ordinary use, must necessarily cross state lines; for the right to appoint a receiver of such property is fruitless if the property may not be used in its ordinary way without exposing the receiver to its loss at the instance of creditors residing in another state into which it may be taken. If receivers of such property are to be appointed at all, the courts of different states must necessarily, in the exercise of that comity which they would like to have conceded to their own judicial proceedings, protect the possession of receivers bringing property within states other than that wherein they were appointed. If the receiver of a railway may not use its cars in transporting freight into other states without forfeiting his special property therein, then his receivership is a substantial condemnation to idleness and decay of the property which was intrusted to his care in the hope that, through his agency, it might continue to answer the public and private purposes for which it was originally acquired, and at the same time realize just profits for those owning or having liens upon it.

LORD v. GOLDBERG.

[81 CALIFORNIA, 596.]

APPELLATE JURISDICTION OF SUPREME COURT IS NOT DEPENDENT UPON COUNTERCLAIM set up by the defendant; and a motion to dismiss an appeal upon the ground that defendant's demand upon his counterclaim does not amount to three hundred dollars will be denied. In an action brought to recover a money demand, the *ad damnum* clause of the complaint is the test of jurisdiction; and if the amount sued for is large enough to give the superior court jurisdiction, the supreme court has jurisdiction on appeal, whether the appeal be taken by the plaintiff or defendant.

CONTRACT FOR PERMANENT EMPLOYMENT, MEANING OF. — Where an employer agrees that the employment shall be permanent as long as the employee desires to make it so, in consideration of the latter's using his best efforts to extend the business, such agreement does not mean that

the employment shall be for life, or for any fixed or certain period, but only that it shall continue indefinitely, and until one or the other of the parties shall wish for some good reason to sever the relation.

EMPLOYER JUSTIFIED IN TERMINATING CONTRACT OF HIRING WHEN. — Where an employer agrees to pay an employee a fixed minimum salary, upon the latter's representations as to the business at his command, with an understanding that the compensation shall be increased as the business increases, and the representations of the employee prove to be untrue, and the business does not justify the payment of the minimum salary promised, the employer is justified in refusing to continue the employment, unless the employee will accept for his services a fair and ratable proportion of the profits actually arising from the business controlled by him; and if such an offer is made to him, and refused by him, and he thereupon leaves the employment, his leaving will be deemed voluntary.

ACTION to recover damages. The opinion states the case.

Jarboe, Harrison, and Goodfellow, for the appellants.

Henry Perry, for the respondent.

BELCHER, C. C. The plaintiff brought this action to recover damages for his wrongful dismissal from the employment of defendants. It is alleged in the complaint that defendants were carrying on the business of grocers in the city of San Francisco; that they negotiated with plaintiff to enter into their employment as solicitor for customers for their groceries, teas, wines, etc.; and that on the twenty-fourth day of November, 1886, it was agreed by and between plaintiff and defendants that in consideration of his entering into their employment as such solicitor, and using all his efforts to secure certain named persons as customers, and to extend their business, "they would give him permanent employment so long as he should use his best efforts to extend their business, paying him at the rate of twenty dollars per week, and increase his salary as the business increased"; that plaintiff performed all the conditions of his contract, procured the persons named and others as customers for defendants, and largely increased their profits; but that defendants, on the second day of April, 1887, wrongfully, and without just or reasonable cause, dismissed plaintiff from their employment, to his damage in the sum of six thousand dollars, for which he asked judgment.

The answer denied the foregoing allegations of the complaint, and alleged that in November, 1886, they employed plaintiff, upon his representations that he could bring to them orders for groceries amounting to between two thousand and three

thousand dollars per month; that it was then agreed that plaintiff should be paid a salary of twenty dollars per week until it could be ascertained what amount of orders he could bring to defendants; that he continued in their employ until about the 9th of April, 1887; that he did not bring to them orders amounting to two thousand dollars, or to any sum exceeding four hundred dollars per month; that the wages paid him at all times exceeded the profits derived from the business brought in by him; that on or about the 1st of April, 1887, defendants proposed to pay plaintiff certain sums in proportion to the business he should bring them, and that he, after taking time to consider the proposition, declined to accept it, and then voluntarily left their employment. Defendants further set up a counterclaim for $251, money lent.

The court found the facts as to the employment and dismissal of plaintiff to be as alleged in the complaint, and that he sustained damage by the dismissal in the sum of $190, for which sum judgment was entered in his favor. There was no finding as to the counterclaim, or as to any of the affirmative allegations of the answer.

The defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

1. The respondent moves to dismiss the appeal "upon the ground that the demand of defendants upon their counterclaim on file herein does not amount to the sum of three hundred dollars, and that this court has no jurisdiction to hear said appeal."

The motion to dismiss the appeal should be denied. The power of this court to hear and determine the matters in controversy here is in no way dependent upon the counterclaim set up by defendants. Under our present constitution and laws, when an action is brought to recover a money demand, the *ad damnum* clause of the complaint is the test of jurisdiction. If the amount sued for is large enough to give the superior court jurisdiction, the supreme court has jurisdiction on appeal; and this is so whether the appeal be taken by the plaintiff or defendant: *Dashiell* v. *Slingerland*, 60 Cal. 653; *Bailey* v. *Sloan*, 65 Id. 387.

2. It is contended for appellants that the findings were not justified by the evidence, and we think this contention should be sustained. It appears from plaintiff's testimony that he had been in the employment of one Lebenbaum, soliciting orders for groceries, and had been receiving from forty to fifty

dollars per month for his services. About the 20th of November, 1886, he saw defendant Goldberg, and was offered by him twenty dollars per week if he would work for defendants, and get for them certain named customers. He then states the arrangement made as follows: "Well, now, says I, while it is a very good increase of salary, will it be permanent, Mr. Goldberg? 'It will,' says he; 'it will last; it will be permanent.'" He further states that he did not go to work for a few days, and that at his request the cashier of defendants drew up and gave to him a written memorandum of the agreement, which reads as follows:—

"SAN FRANCISCO, November 24, 1886.

"*To whom it may concern:* At the request of Mr. Lord, and to satisfy him, in his own mind, that our intentions are wholly honest as regards his permanency in our employ, we hereby declare that our interests are one, and the greater number of friends and their patronage that he can bring to our store, the greater will be his income from us, and his position is permanent so long as he desires to make it so.

[Signed] "GOLDBERG, BOWEN, & Co."

Continuing, plaintiff testified "that he remained in the employment of defendants until the ninth day of April, 1887, and was paid by them twenty dollars per week until said time; that at said time defendants complained that the business introduced by plaintiff was not sufficient to warrant them continuing the existing arrangements with plaintiff, and stated to plaintiff that they would not do so any longer. The defendants at the same time offered to enter into a written contract with plaintiff, to continue until January following, to pay him one half of the profits which should be derived by them from all hotel, restaurant, and institute business which should be introduced to them by plaintiff, and also ten per cent upon the amount of all family trade, exceeding four hundred dollars per month, introduced to them by plaintiff; that plaintiff, after consultation with his friends, refused said offer, and that the relations between plaintiff and defendants were thereupon severed without further negotiations." He further testified, on cross-examination, "that he had not since leaving the employment of defendants made any efforts whatever to obtain any employment, and that he had not earned anything since leaving defendants."

For the defendants it was proved that in the negotiations relative to the employment of plaintiff, he represented that he

could control and introduce to defendants business amounting to between two and three thousand dollars per month, but that the total amount of business introduced to them by him during the whole time of his employment was only seventeen hundred dollars, and that the average profits derived from such business did not exceed ten per cent; that defendants intended, when they employed plaintiff, to retain him in their employment permanently, and that the only reason which induced them to refuse to do so was that the amount of business introduced by him was insufficient to pay the salary provided for.

The foregoing is all the evidence given at the trial material to the point in hand, and it will be observed that the plaintiff in no way denies that he made the representations at the time of his employment which were alleged and proved by defendants. It will also be observed that when plaintiff's attention was called to the fact that he was receiving more salary than the aggregate profits arising from the business he had brought to defendants, and when, after taking the matter under advisement for a time, he refused to accept defendants' offer to pay him a reasonable proportion of the profits to be derived from the business he might bring to them, "the relations between plaintiff and defendants were thereupon severed without further negotiations."

From this it would seem that the plaintiff voluntarily left the employ of defendants, and that he was not, as found by the court, "wrongfully, and without just or reasonable cause, dismissed from their employment."

But however this may be, it is clear that plaintiff's employment was not intended to be for life, or for any fixed or certain period. It was to be "permanent," but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation.

In *Perry* v. *Wheeler*, 12 Ky. 541, the plaintiff was elected permanent rector of a church, and was afterward, as he claimed, wrongfully dismissed. The court said: "Appellant, by his counsel, insists that he was the permanent rector of Grace Church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age or disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandonment of the faith and practices of the Protestant

Episcopal Church. He certainly was elected permanent rector; but we do not understand the term 'permanently,' as used in this case, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. . . . . We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligations to the other, upon fair and equitable terms, and after reasonable notice."

So in *Elderton* v. *Emmons*, 4 Com. B. 478, it was claimed that the plaintiff was retained and employed as the permanent attorney and solicitor of the defendant company, and had been wrongfully discharged. But it was held that the word "permanent," as used in the resolution of appointment, denoted no more than a general employment, as contradistinguished from an occasional or special employment. See also *Newton* v. *Commissioners*, 100 U. S. 548, in which it was held that a county seat was permanently established in a town when it was placed there with the intention that it should remain there.

Moreover, plaintiff's salary was not fixed permanently at twenty dollars per week, but was to be increased as the business increased. This is shown by the complaint, and the memorandum of agreement put in evidence. It was fixed at twenty dollars at first in view of the representations of plaintiff as to the business at his command. These representations, however, proved not to be true, and the salary was more than the business warranted.

Under these circumstances, and after trying the experiment for about twenty weeks, the defendants were justified, we think, in refusing longer to continue the plaintiff in their employment, unless he would accept for his services a fair and ratable proportion of the profits arising from the business controlled and introduced by him. But this they offered and he refused.

We therefore advise that the motion to dismiss the appeal be denied, and that the judgment and order be reversed, and the cause remanded for a new trial.

VANCLIEF, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the motion to dismiss the appeal is denied, and the judgment and order are reversed, and the cause remanded for a new trial.

MASTER AND SERVANT. — When, in a contract of employment, the term of service is left to the discretion of either party, or the term is left indefinite, or determinable by either party, then either party may put an end to it at will; and in such case, it is no breach of contract to refuse to receive further services: *East Line etc. R. R. Co.* v. *Scott*, 72 Tex. 70; 13 Am. St. Rep. 758, and note.

O'NEIL *v.* MAGNER.

[81 CALIFORNIA, 631.]

PROMISSORY NOTE PAYABLE ON DEMAND IS DUE IMMEDIATELY WITHOUT DEMAND, and the statute of limitations commences to run at once from the time of its execution.

NOTE PAYABLE ON DEMAND AFTER DATE IS ORDINARY DEMAND NOTE payable at once, and may be sued on immediately after it is given.

ACTION on a promissory note. The opinion states the case.

P. F. Dunne, for the appellant.

Sullivan and Sullivan, for the respondent.

WORKS, J. Action on the following promissory note:—

"$12,000. SAN FRANCISCO, May 1, 1887.

"On demand, after date, for value received, I promise to pay Margaret Mahony or order the sum of twelve thousand dollars in United States gold coin. DENIS MAGNER."

Defense, the statute of limitations. The action was commenced more than nine years after the date of the note. The only question in the case is as to the time when the note matured and the statute commenced to run.

The court below held that the action was barred, and rendered judgment for the defendant.

The appellant concedes that if this is a note payable "on demand," the same matured immediately, and the statute had run. But it is contended that as the note was made payable "on demand after date," it could not have matured at once, and that therefore an actual demand was necessary to put the statute in motion. The general rule is, that a note payable on demand is due immediately, without an actual demand, and that the statute commences to run at once: *Brummagim*

v. *Tallant*, 29 Cal. 506; 89 Am. Dec. 61; *Cousins* v. *Partridge*, 79 Cal. 228; Story on Promissory Notes, sec. 29; Angell on Limitations, sec. 59; Wood on Limitations, sec. 124.

The language used in the note under consideration does not take it out of this rule. In *Hitchings* v. *Edmands*, 132 Mass. 338, the court said: "The words 'on demand after date' are more analogous to such an expression as 'with interest after date.' If a promissory note payable on demand, with interest after date, is paid the next day after it is given, one day's interest is due and payable. In the case at bar, the intention of the parties to the note was apparently that it should be payable immediately, and no intention appears on the face of the note that the parties intended to stipulate for at least one day's time before the demand could be made." So it was held that the note was an "ordinary demand note, payable at once on demand, on which an action could have been brought immediately after it was given": *Fenno* v. *Gay*, 146 Mass. 118.

These views apply to the note we are considering, and meet with our approval.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS. — The statute of limitations begins to run from the date of a promissory note payable on demand, with interest: *Wheeler* v. *Warner*, 47 N. Y. 519; 7 Am. Rep. 478; *Tripp* v. *Curtenius*, 36 Mich. 494; 24 Am. Rep. 610, and note; *Brummagim* v. *Tallant*, 29 Cal. 503; 89 Am. Dec. 61, and note; *Fenno* v. *Gay*, 146 Mass. 118.

NOTE PAYABLE UPON DEMAND. — The payee of a demand note may sue the maker without any demand other than that made by the suit itself: *Cousins* v. *Partridge*, 79 Cal. 224.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

PEOPLE *v.* HEALY.

[128 ILLINOIS, 9.]

IN ACTION FOR FRAUD AND DECEIT, PLAINTIFF MUST ALLEGE the facts constituting the fraud; and where false representations are relied upon, it is essential that they relate to some material existing fact, and not to the future intention of defendant, which he may or may not perform.

FRAUD — PURCHASER ON CREDIT. — Representations of a purchaser of goods on credit, that he will pay the value of the goods, is simply a promise to pay at the expiration of the credit, and his subsequent inability to discharge his obligation will not render him liable to an action for fraud and deceit. The remedy is in *assumpsit* for the price and value of the goods.

FRAUD. — GROUND OF LIABILITY IN ACTIONS OF FRAUD AND DECEIT, that renders defendant amenable to an action in tort, rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false.

FRAUD — FALSE REPRESENTATIONS. — A PROMISE TO PERFORM an act, though accompanied at the time with an intention not to perform, is not such a representation as is ground for an action at law. The party must sue upon the promise.

ACTION OF FRAUD AND DECEIT AGAINST A PURCHASER OF GOODS ON CREDIT cannot be maintained simply on the allegation of the fact that the purchaser knew himself to be insolvent, and had no reasonable expectation of paying for the goods purchased.

FRAUD. — PURCHASE OF GOODS BY ONE WHO AT THE TIME INTENDS NOT TO PAY for them is such a fraud as will enable the seller to rescind the sale, although there were no false representations or pretenses.

FRAUD. — TO HOLD A PURCHASER OF GOODS ON CREDIT liable in an action for fraud and deceit, he must have been guilty of making some past or present false representation of fact, or of practicing some artifice or deception.

AN ALIAS CAPIAS AD SATISFACIENDUM ought not to issue to reimprison a judgment debtor for the same cause for which he has been imprisoned

under an original *capias ad satisfaciendum*, and from which imprisonment he has been duly discharged on *habeas corpus*, on the ground that it issued in a case not involving a tort.

Flower, Remy, and Gregory, for the petitioners.

Rufus King, for the respondent.

SHOPE, J. A petition was filed in this court by Almon D. Ellis and another, for a *mandamus* to compel the respondent, John J. Healy, clerk of the superior court of Cook County, to issue an *alias capias ad satisfaciendum* against the body of Elias Levee, upon a judgment in that court in favor of petitioners against said Levee. It is shown that said judgment was recovered March 17, 1884, in an action of trespass on the case, for $374.70. May 16, 1884, the defendant, Levee, was arrested upon a *capias ad satisfaciendum* issued on said judgment, and imprisoned until June 6, 1884, when he was discharged on a writ of *habeas corpus*. In August following, petitioners demanded of the clerk of said court that he issue an *alias capias ad satisfaciendum* against the body of Levee, which he refused to do, and hence this petition.

The statute provides that "no execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad respondendum*, as provided by law, or he shall refuse to surrender up his estate for the benefit of his creditors": R. S., c. 77, sec. 5.

The respondent answered the petition, and to which a general demurrer was interposed. It will not be necessary here to set out in detail the petition and answer, but we will proceed to determine the case made thereby. The petition proceeds upon the basis that the judgment was recovered for a tort committed by the defendant. The answer, in effect, denies that the cause of action was for a tort, and sets up the discharge of the defendant, on *habeas corpus*, from arrest and imprisonment for the same cause for which the writ is now asked to be issued.

The first question presented is, Was the cause of action on which the judgment was obtained a tort committed by the defendant? It was by default, and we must therefore look to the allegations of the declaration, which is made an exhibit, rather than to the form of action adopted by the pleader, to ascertain the nature of the cause of action: 1 Hilliard on

Torts, 35; *McDuffie* v. *Beddoe*, 7 Hill, 578; *Weal* v. *King*, 12 East, 452; *New Orleans etc. R. R. Co.* v. *Hurst*, 36 Miss. 660.

If one, by means of a false warranty, induces another to purchase, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort: Cooley on Torts, 90. So a recovery may be had for money embezzled in an action *ex contractu*. It is apparent, therefore, that the form of the action will not necessarily determine the nature of the cause of action.

The declaration alleges that on the first day of September, 1883, plaintiffs were possessed of certain goods, of the value of one thousand dollars, and that "the defendant falsely and fraudulently, and for the purpose of inducing the plaintiffs to part with the possession of said goods, represented to the plaintiffs that he desired to purchase said goods of the plaintiffs on credit, and that he would pay for said goods their reasonable value, and thereupon the said plaintiffs, relying upon the said representations and promises of said defendant in that behalf, and believing the same to be true, sold and delivered the said goods and chattels to said defendant on credit; and said plaintiffs aver that said promises and representations of said defendant were utterly false at the time they were made, and were so known to the said defendant, and were made by said defendant with the fraudulent purpose of obtaining possession of said goods without paying for the same, and that at that time said defendant was wholly insolvent, and was fully aware of that fact, and knew, when he bought said goods, that he could not pay for the same as he agreed, and that said defendant has never paid for said goods, and obtained said goods from said plaintiffs with the fraudulent purpose of not paying for the same, and of cheating and defrauding said plaintiffs out of said goods."

In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud; and where false representations are relied upon, it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant, which he may or may not perform. The only representation of an existing fact here alleged is, that the defendant desired to purchase the goods on credit, and as he did so purchase them, it cannot be said that the representation in respect thereof was false. The declaration alleges that plaintiff sold and delivered the goods to the defendant on credit, but it wholly fails to show

that when the suit was brought the time had expired when payment was to be made therefor. The representations of a purchaser of goods on credit, that he will pay the value of the articles purchased, is simply a promise to pay. Every purchaser on time either expressly or impliedly undertakes and promises to pay at the expiration of the credit, and a subsequent inability to discharge his obligation will not render the purchaser liable to an action for fraud or deceit.

The ground of liability, in this class of cases, that renders the defendant amenable to an action in tort rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false. In *Gallagher* v. *Brunel*, 6 Cow. 350, the court, in commenting on *Pasley* v. *Freeman*, 3 Term Rep. 513, say: "In that case the defendant encouraged the plaintiff to sell goods, and fraudulently affirmed that the purchaser was a person safely to be trusted. The *gravamen* was the false affirmation of an existing fact,—not a promise to do a future act at the time not intended to be performed, and which, notwithstanding the intent, might or might not be performed." And after quoting Buller, J., in the Pasley case, to the same effect, the court conclude: "It is evident what must be the species of fraud for which the law gives redress,—falsehood as to an existing fact." In respect of the allegation of a promise to pay without any intention to perform, it is said in Kerr on Fraud and Mistake, 88: "As distinguished from the false representation of a fact, the false representation as to a matter of intention, though it may have influenced a transaction, is not a fraud in law." In *Gage* v. *Lewis*, 68 Ill. 604, after quoting the above from Kerr with approval, this court said: "It cannot be said that these representations and promises were false when made, for until the proper time arrived, and the plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract." And in the same case it is said: "A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise."

In Massachusetts, under a statute making the debtor liable

to imprisonment if "the debtor contracted the debt with an intention not to pay for the same," it was held that the charge that the debtor, "at the time when the debt was contracted, did not intend to pay the same," and that "he contracted said debt having no intention to pay the same, and having no expectation that it would be paid," was not sufficient, even after verdict: *Chamberlain* v. *Hoogs*, 1 Gray, 172.

The allegation of the declaration is, that the defendant's promises and representations were made by him "with the fraudulent purpose of obtaining possession of said goods without paying for the same." It is not alleged that the defendant never intended to pay for them, and the pleadings and exhibits before us negative such an intention. The sale was in September, and amounted substantially to one thousand dollars, which, at the time of proving plaintiff's claim before the assignee of Levee, and also of the rendition of this judgment, was reduced to less than $375, and the assignment by Levee, in December following his contracting this indebtedness, showed assets to substantially seventy-five per cent of his entire liabilities. There is no allegation in the declaration that the defendant therein made any representation as to his solvency or financial ability, or that plaintiffs were not fully acquainted with the same. It is not enough, to maintain the action, that the defendant knew himself to be insolvent, and had no reasonable expectation of paying for the goods purchased.

In *Blow* v. *Gage*, 44 Ill. 208, the debtors made an assignment of their property for the benefit of creditors shortly before the arrival of the goods purchased, and the assignee took them when they arrived. In a suit to avoid the sale, this court said: "It has never been considered fraudulent for business houses to purchase on credit simply for the reason that they knew that they were unable at the time to pay their debts": See, to the same effect, *Biggs* v. *Barry*, 2 Curt. 259; *Hodgeden* v. *Hubbard*, 18 Vt. 504; *Lloyd* v. *Brewster*, 4 Paige, 537; 27 Am. Dec. 88; *Hennequin* v. *Naylor*, 24 N. Y. 139; *Rodman* v. *Thalheimer*, 75 Pa. St. 232; *Morrill* v. *Blackman*, 42 Conn. 324; *Talcott* v. *Henderson*, 31 Ohio St. 162; 27 Am. Rep. 501; *Shipman* v. *Seymour*, 40 Mich. 274; *Klein* v. *Rector*, 57 Miss. 538; *Merrill* v. *Corbin*, 13 Brad. App. 81; *Rowley* v. *Bigelow*, 12 Pick. 307; 23 Am. Dec. 607.

It is true that the purchase of goods by one who at the time never intends to pay for them is such a fraud as will entitle

the vendor to rescind the sale; although there were no fraudulent representations or false pretenses: Benjamin on Sales, sec. 439; *Farwell* v. *Hanchett*, 120 Ill. 573; *Ryan* v. *Brant*, 42 Id. 78; *Bowen* v. *Schuler*, 41 Id. 193. But the petitioners did not seek to avoid the sale, and recover back the possession of the goods sold, as in the cases last cited; and in order to hold a purchaser of goods liable, in an action on the case, for fraud and deceit, he must have been guilty of making false representations, or practicing some artifice or deception; and where the alleged false representations are made the basis of the action, they must, as we have seen, relate to some past or existing fact.

We are of opinion that the allegations of the declaration were insufficient to enable plaintiffs therein to maintain an action for a tort. Their action should have been in *assumpsit*, for the price and value of the goods. It appears, therefore, that the plaintiffs' judgment is not for a tort committed by the defendant, within the meaning of the statute, and it follows that the petitioners have not now, and never had, upon that judgment, a right to an execution against the body of the defendant therein.

It appears, from the answer of the respondent, which is admitted to be true by the demurrer, that a writ of *capias ad satisfaciendum* was issued on said judgment May 16, 1884, in due form of law, upon which Levee was arrested and committed to the common jail of Cook County. Afterwards, and on June 6, 1884, he was discharged upon *habeas corpus*, by the Hon. John G. Rogers, then one of the judges of the circuit court of said county. The answer to the petition in this case attaches the petition and order in such *habeas corpus* proceeding thereto, and makes it a part of the answer, and avers the truthfulness of the matters therein alleged and set forth.

Section 26, chapter 65, of the Revised Statutes provides that "no person who has been discharged, by order of the court or judge, on a *habeas corpus*, shall be again imprisoned, restrained, or kept in custody for the same cause." This section also provides that the following, among others, shall not be deemed to be the same cause: "2. If, in any civil suit, the party has been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same offense"; and "3. Generally, whenever the discharge has been ordered on account of the non-observance of any of

the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed." The answer expressly alleges that "the cause upon or for which the said petitioner has applied to this respondent, and requested him to issue an *alias capias ad satisfaciendum*, as alleged in their petition, is the same cause" upon which the said Levee was imprisoned, and from which he was discharged upon *habeas corpus*, as before mentioned. The only ground stated in the petition for *habeas corpus*, made an exhibit to and part of the answer of respondent herein, for the discharge of Levee, was, that the *capias* "issued in a case and under circumstances where the law does not allow process for imprisonment to issue; that he is imprisoned for the non-payment of a debt owing by him to Ellis and Putnam for merchandise purchased by him of them, and being for a balance on account of $374.70." It therefore affirmatively appears that the relators are seeking by this proceeding to obtain an *alias capias ad satisfaciendum* to again imprison said Levee for "the same cause" as that on which he was before imprisoned, and from which he was discharged. It is not shown or pretended that the discharge was on account of any defect or illegality in the judgment or process, or "on account of the non-observance of any of the forms required by law." If the discharge had been procured for any such reason, it was incumbent upon the petitioner to make the same appear. It follows, therefore, that the writ should be denied upon the ground, also, that said Levee cannot be imprisoned a second time upon said judgment, and that the issue of the writ authorizing the same would be illegal, and, if issued, void.

The prayer of the petitioners will be denied.

PLEADING IN CASES OF FRAUD. — In pleading fraud, general allegations are not sufficient, but the facts constituting the fraud must be specifically alleged: *Albertoli* v. *Branham*, 80 Cal. 631; 13 Am. St. Rep. 200, and note; *People* v. *McKenna*, 81 Cal. 158; *Knight* v. *Glasscock*, 51 Ark. 390; *Wait* v. *Kellogg*, 63 Mich. 138; *Tepoel* v. *National Bank*, 24 Neb. 816; *State ex rel.* v. *Williams*, 39 Kan. 517; *Applegarth* v. *McQuiddy*, 77 Cal. 408.

FRAUD — PROMISES. — Mere promises are not, strictly speaking, representations: *Lawrence* v. *Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; *Feeney* v. *Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Adams* v. *Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202. Statements respecting future events, or things to be performed in the future, cannot be true or false when uttered, and hence cannot be enforced unless they amount to a valid contract: *Knowlton* v. *Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; *McLain* v. *Buliner*, 49 Ark. 218; 4

Am. St. Rep. 36, and note. But making a promise, with no intention at the time of performing it, constitutes a fraud for which a contract may be rescinded: *Lawrence* v. *Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29, and numerous cases in note 36, 37, as to what false representations constitute fraud for which a contract may be avoided.

TYLER *v.* SANBORN.

[128 ILLINOIS, 136.]

AGENCY — WIFE OF AGENT AS PURCHASER. — An agent empowered to sell cannot convey the property to his wife as her separate estate through the aid of a third person, without the knowledge and consent of his principal, and the latter may avoid such conveyance at his election, no matter whether the price paid was adequate or not.

AGENT CANNOT, DIRECTLY OR INDIRECTLY, have an interest in the sale of property of his principal without the latter's consent freely given, after full knowledge of all facts known to the agent; and it does not matter that no fraud was intended, nor advantage derived from the transaction by the agent; and in such cases the burden of proof is on him to show the knowledge and consent of the principal.

AGENCY — CONVEYANCE BY HUSBAND AS AGENT TO WIFE. — Though the Illinois statute empowers the wife to contract with her husband, and to hold a separate estate during coverture, still it has not denied to each all interest in the property of the other; the husband still has a pecuniary and relational interest in his wife's estate, and is prohibited from conveying property to her, for which he is the agent to sell, without the full knowledge and express consent of his principal.

Kerrick, Lucas, and Spencer, for the appellants.

Isaac N. Phillips and James S. Ewing, for the appellees.

SCHOLFIELD, J. George F. Tyler and Edwin S. Tyler, as executors of the last will and testament of Frederick Tyler, deceased, were the owners of certain lots in the village of Chenoa, in McLean County. George F. Tyler resided in Philadelphia, Pennsylvania, and Edwin S. Tyler resided in Hartford, Connecticut. They employed O. D. Sanborn, who resided in Chenoa, to take charge of the property, rent it, and procure a purchaser for it. He was to obtain offers to purchase, and report to them, leaving them to accept or decline the offers, as their judgments should direct. After some futile efforts in this way, Royal E. Beard proposed to pay one thousand dollars for the property, and take it as it was, they removing the encumbrance occasioned by a tax sale made before that time, then supposed to be upon it. Sanborn reported this offer to the Tylers, and they accepted it, and forwarded to Sanborn a deed of the property. When Sanborn

received the deed, he notified Beard of the fact, and that he was ready to deliver it. What then took place is thus narrated by the several witnesses: —

Sanborn says: "I notified Mr. Beard that the deed was ready for him, and he said he was sorry, — that he hoped they would not accept it. I said I hated to have him back out on the property, and would like to complete the trade as we had started, and I did not want to return any more papers; that they had found fault with the others, and they would begin to think that it was all boy's play out here, and too much of that returning papers, and he finally said he would let me know that evening whether he would take it or not. That evening he came in and said he did not want the property, and did not want to take it. I had no written contract with him, and he had paid nothing, and I still had possession of the deed when he told me he did not want the property. When I was at home that evening, I was telling my wife that I was afraid I was going to have trouble to sell that property; that Beard had come in, and did not want it, and I was feeling that my labors had all been in vain, and she spoke up and said, if Beard wanted to sell it for what he gave for it, she would buy and take it off his hands. He said he would let her have it at what he gave for it if she would take it. Mr. Beard, the next day, I think, brought his wife in, and they executed a deed to my wife, and my wife paid the money. Beard never paid me any money. He never furnished any of the money. I presume I had a talk with my wife about it before that evening. She knew the price I was selling to Fales for, and knew that I was acting for eastern parties. I told her I thought she did not want to buy the property. I did not tell her what I thought it was worth. I was just eating supper, and told her he was going to back out, and she said she would take it at that price, and I opposed buying it, and she insisted on buying. I never reported any of these facts to the Tylers. Before this time I had never expressed any opinion to my wife as to what I thought the property was worth. I had been married about three years, and was postmaster. My wife was in no business, but had some means. It was invested in notes and certificates of deposit. I looked after making investments and buying notes for her, after consulting with her. No one else did any business for her."

On cross-examination he said, among other things: "At the time of the purchase of this property, my wife had about

three thousand five hundred dollars; but I had no means." And again, speaking of Beard's refusal to take the property, he repeated: "I then went home, and had this talk with Mrs. Sanborn,—told her I thought the sale would go up, and she said she would take the property. She was able to do so, and bought it against my objection. Up to that time, she had been loaning her money. Beard came in again that evening, and I told him what my wife had said about it, and he said he would make a deed to her; and he did so the next day. I took the deeds to Bloomington, here, and had them recorded, as an accommodation to my wife and Mr. Beard. She paid the money, and I sent it to Mr. Tyler. I have no interest, either absolute or conditional, in any shape or form, in the property, except my dower."

Frances C. Sanborn said: "When he [her husband, O. D. Sanborn] reported to me that Beard probably would not take the property, I said: 'I will take it,—that is, if Mr. Beard will sell it to me for the same price he was to give the Tylers.' He said I did not want it, and I said I wanted to put my money into something solid; and he further objected, and told me of the cracks in the walls, and the disrepute it was in, and I still said I thought it was very cheap, and that I wanted to take it. It was an impulsive conversation on my part. I never had thought of it before. I told him to tell Mr. Beard I would take it. I don't remember when the next conversation was. It was some time before I paid for it. I paid Mr. Sanborn. I remember making up the money to pay him, but don't remember what the amounts were made up from. That was when Mr. Sanborn had completed his arrangements so he could send the purchase-money. It was not the same day I had the other talk. I should think it was some weeks. The deed was made and delivered to Beard, and from Beard to me, without any money having been paid to anybody. I don't know how the money was sent to Mr. Tyler, nor where it was gotten to send to him. The same evening Mr. Sanborn told me about the property,—that Beard would not take it,—he told me I could have it. At that time Mr. Sanborn had charge of my business affairs; but I advised with no one about buying this property." On cross-examination, she again said: "He [Sanborn] said Mr. Beard would sell it to me just as he had bought it if I would take it off his hands. We then talked it over, and I made up my mind that I still wanted it, and he said to me that if I was bound to have it, he would tell Mr.

Beard to-morrow, and have the deeds made. There was no agreement or understanding between Mr. Beard and myself that it was a purchase for me, or that he was to have any interest in it. Prior to the time I have spoken of, there was no understanding that the property should be sold to Beard, and by Beard to me."

Beard said, after speaking of his offer to buy, his ability to pay, etc.: "I offered him one thousand dollars cash. Several weeks after, he came to me and informed me that my offer had been accepted. I told him that, upon considering the matter, I had decided not to take the property. He urged me to take it, and I told him I would consider the matter, and call at his post-office that evening. I called on him that evening, and told him I had decided not to take it, and he told me his wife, Frances C. Sanborn, would take the property if I would deed it to her without expense to her, and I did so. I never paid anything for those lots, and never received any money or anything for them."

Evidence was introduced tending to show that the lots were, at the time these deeds were made, worth much more than one thousand dollars, and there was, on the other hand, other evidence introduced tending to rebut that. Perhaps a fair deduction from the evidence is, that the lots were generally estimated as worth more than one thousand dollars, but that all real estate, and especially in Chenoa, was, at that time, difficult to sell, and that it is not clear that any person was then ready to pay, in cash, more than one thousand dollars for these lots; but in the view that we shall take of the case, it may be admitted that there was not such inadequacy between the price paid and the actual value of the lots as, of itself, to raise a presumption of a fraudulent intent.

The bill asks to have the deeds set aside as fraudulent as against the rights of the Tylers. The decree dismissed the bill at the complainants' costs. If, from the allegations in the bill and the facts proved, the transaction is one deemed fraudulent in law, it can, of course, be of no consequence that the allegations of fraud in fact are not proved. If any alleged ground of relief is proved by the evidence, the decree below is erroneous, and must be reversed.

The evidence quoted *supra* can leave no doubt on the mind as to the real character of the transaction. It was, in effect, a sale and conveyance to Frances C. Sanborn, by her husband, O. D. Sanborn, as the agent of the Tylers, without their knowl-

edge. The sale to Beard was not consummated. He refused to take the property, but became an agent in fact for Frances C. Sanborn, whereby she was enabled to obtain the legal title. In equity, the execution of the deed by Beard to her, and the delivery thereafter of both deeds to her, was but the execution and delivery of a deed to her by the Tylers, without their knowledge.

Admitting that the price paid for the property was not grossly inadequate, and that it was one with which, if it had, in good faith, come from Beard, the Tylers would have been satisfied, the question is still left, whether the fact that the purchase was made by the wife of their agent, without their knowledge, of itself, alone, renders the deed voidable, at their election.

The doctrine is familiar, and has been often recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal: *Coat* v. *Coat*, 63 Ill. 74; *Ebelmesser* v. *Ebelmesser*, 99 Id. 548; *Zeigler* v. *Hughes*, 55 Id. 288; *Hughes* v. *Washington*, 72 Id. 85. It is of no consequence, in such case, that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent: Kerr on Fraud and Mistake, Bump's ed., 173, 174; Perry on Trusts, sec. 206; Story's Eq. Jur., sec. 315; Bispham's Eq., 2d ed., sec. 238, p. 299. The rule is not merely remedial of wrong actually committed,—it is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the chief justice in *Staats* v. *Bergen*, 17 N. J. Eq. 554, that "a trustee may not put himself in a position in which, to be honest, must be a strain on him." An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such case the burden is upon the agent to show that the principal had knowledge, not only of the fact that the agent was buying or interested, but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he freely consented to the transaction: *Porter* v. *Woodruff*, 36 Id. 174; *Dunne* v. *English*, L. R. 18 Eq. Cas. 524; 10 Eng. Rep. (Moake's notes) 837; see also notes to *Fox* v. *Mackreth*, *Pitt* v. *Mackreth*, 1 Lead. Cas. Eq. (Hare and Wallace's notes), 3d Am. ed., 209, 210, et seq., 220. The rule

is equally applicable to cases where the agent is empowered to sell, as in the present case, at a stated price, as where his authority is to sell generally: 1 Am. & Eng. Ency. of Law, 376, and cases cited; *Porter* v. *Woodruff*, 36 N. J. Eq. 174; *Ruckman* v. *Bergholz*, 37 N. J. L. 437; *Peckham Iron Co.* v. *Harper*, 41 Ohio St. 108.

It is plain, then, that, under the authority to deliver the deed to Beard for the one thousand dollars, no authority was conferred to use Beard as a mere agent or trustee to convey the title to Sanborn or to some one else, so that he would have an interest in it, merely because the Tylers would thereby receive the same money they would have received had the deed been delivered to Beard. The Tylers are allowed to treat the conveyance as void, at their election, not because they have been injured, but because the law will not allow their agent, Sanborn, to occupy a position in which he might be tempted to betray his trust. See cases cited *supra*, and notes to *Fox* v. *Mackreth* and *Pitt* v. *Mackreth*, *supra*, at page 211. When Beard declined to take the property, the Tylers were entitled to know that Sanborn had concluded to let his wife take it, unless, indeed, it can be held that the conveyance to her was as much a matter of indifference to him, in a legal sense, as if it had been to a stranger,—and that is, in effect, the contention of counsel for appellees.

Such a sale, at common law, would clearly have been voidable, both because the wife there had no independent power to contract, and because the husband would have taken an estate during coverture in the property: See 1 Bla. Com. (Sharswood's ed.), 441, *442; Reeve on Domestic Relations, 2d ed., 98, *99; and also Id. 28. Notwithstanding that our statute has so far changed the common law that the wife can now contract with the husband, and has abolished his estate during coverture, it has not denied to each all interest in the property of the other. The husband is still the head of the family, and the expenses of the family and of the education of the children are, by section 15 of the statute in relation to husband and wife, charged upon the property of both husband and wife, or of either of them, in favor of creditors: R. S. 1874, p. 577. Upon the death of the wife, intestate, without children surviving, the husband inherits one half of her real estate: Id., p. 39, sec. 1. And, in any event, upon her death, he is entitled to dower in her real estate. Hence the husband still has a pecuniary interest, greater or less, as circumstances may

vary, in all the real estate of which his wife may be owner during coverture. There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position, as between his wife and a stranger, in a business transaction. He may, by reason of his great integrity, be just in such a transaction; but unless his marital relations be perverted, he cannot feel disinterested, — and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife.

In our opinion, the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency, without the knowledge and express consent of the principal. The wife is here shown to have known the relation of her husband to the Tylers in respect to this property, and all the facts in regard to the transaction with Beard. She is therefore charged with knowing that she could not become the purchaser without letting the Tylers know it, and the burden is on her to show that they did know it.

The Tylers are, in our opinion, entitled to have these conveyances canceled, upon returning to Frances C. Sanborn what they have received, with accruing interest; and as against this, they are entitled to a deduction of the reasonable value of the rents and profits, above and beyond the amount paid for taxes and necessary repairs.

The decree below is reversed, and the cause remanded to the circuit court, with directions to there enter a decree in conformity with this opinion.

BAILEY, J., dissented from the view that there was such fraud in law, from the transaction in this case, as must necessarily make it void; and, while he assented to the soundness of the rule that an agent employed to sell could not, directly or indirectly, become the purchaser without the assent of the principal with knowledge of the facts, and if he did, that the principal could avoid the sale, still he maintained that the purchaser in this case was not the agent, but another person, capable of acquiring, owning, and controlling her separate property, as a *feme sole* wholly independent of her husband, under the statute emancipating her from her common-law disabilities, and giving

her the same control over her separate estate as the husband has over his, with the same power to acquire or sell property, or engage in business, as if *sole*, and which, in contemplation of law, makes her a stranger to her husband, so that she may act independently of him, or assume an adverse position to him, as far as such estate is concerned. He could not, therefore, assent to the doctrine that the wife of an agent must, as matter of law, be held subject to the same incapacity to purchase property for which her husband was the agent to sell as the agent himself, but asserted that whether such purchase is to be treated as fraudulent and voidable depended upon the circumstances, and presents a question of fraud in fact, and not of fraud in law; that, in such a case as the present, the fact that the purchaser and vendee are husband and wife is a circumstance to be considered, with other evidence, when fraud is alleged; and that the relation of husband and wife will not alone create an inference of fraud, although less evidence will create it in such cases than where the parties do not bear such near relations to each other. In every such case fraud must be alleged and proved, and the relation of the parties only be considered as a circumstance bearing upon the measure of proof required to sustain the allegation. Chief Justice Craig concurred in this dissenting opinion.

PRINCIPAL AND AGENT. — An agent cannot profit out of his principal, for whom he has undertaken to act: *Vallette* v. *Tedens*, 122 Ill. 607; 3 Am. St. Rep. 502, and note; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372; *Herrlich* v. *McDonald*, 80 Cal. 473; *Siedenbach* v. *Riley*, 111 N. Y. 560; *Baxter* v. *First Nat. Bank*, 85 Tenn. 33.

CONTRACTS BETWEEN PRINCIPAL AND AGENT. — Contracts between principal and agent must be scrutinized with jealousy, and the slightest circumstances of inequality, surprise, or hardship may avoid them, often without proof of actual fraud: *McHarry* v. *Irvin*, 85 Ky. 322; and the burden of proof is upon the agent to show the good faith and fairness of such contracts: *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372. So that an agent cannot, without the knowledge and consent of his principal, so negotiate a sale of his principal's realty as to get the title to the same in himself: *Bookwalter* v. *Lansing*, 23 Neb. 291; compare *McKay* v. *Williams*, 67 Mich. 547; 11 Am. St. Rep. 597.

MARRIED WOMEN. — As to the *status* of married women under the statutes of Illinois, see note to *Kirkpatrick* v. *Buford*, 76 Am. Dec. 374, 375.

WOODWARD *v.* BROOKS.

[128 ILLINOIS, 222.]

PARTNERSHIP — EFFECT OF DISSOLUTION BY DEATH. — The retention and use of the firm name after the death of one of the partners creates no liability on the estate of the deceased, and the surviving partner, by accepting a draft in the firm name, makes himself personally liable therefor.

CONTRACTS. — LEX LOCI GOVERNS VALIDITY, interpretation, and construction of contracts, as a general rule; still, not all contracts valid where made will be enforced by the courts of other states. In respect to the time, mode, and extent of the remedy, the *lex fori* governs.

FOREIGN ASSIGNMENT FOR BENEFIT OF CREDITORS. — In the absence of claims of domestic creditors, the assignee under a valid foreign assignment may reduce to his possession the property and collect the debts assigned to him in Illinois, and debtors there, owing the assignor, and having no set-off, will be compelled to pay the assignee; but if the assignment, if made in the latter state, would be set aside as fraudulent, or contrary to the policy of the law, then it will not be enforced as against attaching creditors, foreign or domestic, although it may be valid in the state where made.

VOLUNTARY FOREIGN ASSIGNMENT FOR BENEFIT OF CREDITORS, valid in the state where made, is only enforced in Illinois as a matter of comity, and it will not be enforced to the prejudice of citizens who may have demands against the assignor; but for all other purposes, and between citizens of the state where the assignment was made, if valid by the *lex loci*, will be carried into effect by the courts of Illinois.

J. M. H. Burgett, for the appellants.

Hutchinson and Luff, for the appellees.

By COURT. Josiah D. Brooks and D. Leeds Miller, while partners, doing business in Philadelphia under the name and style of Brooks, Miller, & Co., acquired title to a lot in Cook County, in this state, in the firm name, and taken in payment of a firm debt. On November 23, 1883, the firm was dissolved by the death of Miller; but Brooks continued the business under the same firm name, and while so acting, on May 20, 1884, accepted a bill of exchange drawn on him in the said firm name, in favor of the plaintiffs, James S. Woodward and Sons. The retention and use of the firm name after Miller's death created no liability on Miller's estate, so that by accepting the draft in the firm name Brooks made himself individually liable to the plaintiffs therefor. On July 1, 1884, Brooks entered into partnership with William G. Jenks, and they, under the same firm name, carried on business in Philadelphia until September 4, 1884, when they failed, and made a voluntary assignment for the benefit of creditors to Edward S. Harlan, assignee. The deed of assignment, after reciting that Brooks and Jenks were indebted to divers persons, grants, bargains, sells, and conveys to said Harlan, "all and singular the lands, tenements, and real estate, and also all the goods, chatfels, effects, and property of every kind, real, personal, and mixed, of the said Josiah D. Brooks and William G. Jenks," except so much thereof as might be exempt from execution, in trust, to sell and dispose of the same, and to collect and receive all debts due to said Brooks and Jenks, or either of them, and from the proceeds to pay,—1. The

expenses incident to the trust; 2. The "creditors of said Brooks and Jenks their respective just demands in full, if sufficient; otherwise, *pro rata*"; and 3. Any surplus "to said Brooks and Jenks."

The principal question discussed by counsel relates to the effect a voluntary assignment of all his property by a foreign debtor for the benefit of creditors will have on his property having a *situs* in this state. At the time of this assignment, the garnishees had in their hands something over twelve hundred dollars, one half of which is claimed to belong to Josiah D. Brooks, and the other half to the heirs of Miller, being the proceeds of the sale of the real estate before mentioned as belonging to the original firm of Brooks, Miller, & Co. It is not shown that there had been an adjustment of the partnership assets and accounts between Brooks and the heirs of Miller, so that the extent of Brooks's interest in this sum of money cannot be told. After the assignment was made, acknowledged, and recorded in conformity with the laws of Pennsylvania, where the debtors resided, the plaintiffs, residents of the same state, with notice of the assignment, brought attachment in the superior court of Cook County against Brooks, and service was had on said garnishees. The assignee, Harlan, interpleaded in that cause, claiming one half of the money in the garnishees' hands under the assignment, while the plaintiffs claimed the same money in the hands of the garnishees by virtue of said attachment proceeding. The deed of assignment, apparently, is valid under the laws of the state of Pennsylvania. As the deed is there valid, it must be held valid here, it being the general rule that the *lex loci* will govern in determining the validity of contracts, and in their interpretation and construction. It does not, however, follow that all contracts valid where made will be enforced by courts of other states or jurisdictions. In respect of the time, mode, and extent of the remedy, the *lex fori* governs: *Mineral Point R. R. Co.* v. *Barron*, 83 Ill. 365.

In the absence of claims of domestic creditors, the assignee under a valid foreign assignment may reduce to his possession the property, and collect the debts assigned to him within this state, and debtors here, owing the assignor, and having no set-off, will be compelled to pay the assignee. But if the foreign assignment, if made here, would be set aside as fraudulent, or as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign

or domestic, although it may be valid in the state where made: *May* v. *Wannemacher*, 111 Mass. 202; *Zipcey* v. *Thompson*, 1 Gray, 243; *Fall River Iron Works Co.* v. *Croade*, 15 Pick. 11; *Kelly* v. *Crapo*, 45 N. Y. 86; 6 Am. Rep. 35; *Guillander* v. *Howell*, 35 N. Y. 657.

As a voluntary foreign assignment, valid in the state where made, is enforced in this state as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a non-resident debtor to be withdrawn from this state before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction; so it was held in *Heyer* v. *Alexander*, 108 Ill. 385, that a voluntary assignment of a non-resident debtor's property, valid under the laws of the state where made, will not be enforced here as against domestic attaching creditors. See *Chaffee* v. *Fourth Nat. Bank*, 71 Me. 524; 36 Am. Rep. 345; *Kelly* v. *Crapo*, 45 N. Y. 86; 6 Am. Rep. 35; *Johnson* v. *Parker*, 4 Bush, 149; *Chicago etc. R'y Co.* v. *Keokuk N. L. Packet Co.*, 108 Ill. 317; 48 Am. Rep. 557; *Life Association of North America* v. *Fassett*, 102 Ill. 315.

In *May* v. *First Nat. Bank of Attleboro*, 122 Ill. 551, we held that a voluntary assignment made in another state by a non-resident there, executed in conformity with our laws in respect to the conveyance of property, but inconsistent, in substantial respects, with our statute relating to assignments, will not be enforced here to the detriment of our citizens; but for all other purposes, and between citizens of the state where the assignment was made, if valid by the *lex loci*, it will be carried into effect by the courts of this state. That case is decisive of the one at bar. In the present case, there are no domestic creditors to be affected. The attaching creditors are resident in the same state with the assignor, and where the assignment was made and will be executed. As before seen, the assignment is valid under the laws of Pennsylvania, and capable of being enforced there, and under the doctrine announced, the courts of this state will give it effect as against citizens of Pennsylvania. The heirs of Miller are not complaining here. It seems that they, as well as the assignee, assignors, and attaching creditors, are all residents of the same state. The claim made by the assignee, as well as by the attaching creditors, is of Brooks's interest in the money in the hands of the garnishees. If the Miller heirs have an equitable right to

more than one half of the money now in the hands of the garnishees, it is not perceived why that question may not be determined by an adjustment of the partnership accounts of the original firm in the courts of that state.

The rule here announced is not in conflict with *Rhawn* v. *Pearce*, 110 Ill. 350. In that case, the assignment was not voluntary, but resulted by the laws of the state of Pennsylvania. A statutory assignment will not be enforced against attaching creditors of another state: *May* v. *First Nat. Bank of Attleboro*, *supra*.

Finding no error in this record for which the judgment should be reversed, it is affirmed.

PARTNERSHIP. — The death of a partner has the effect of dissolving the firm, and from that time the only thing that can be done by the late firm, or any of the surviving members thereof, to bind the property of the deceased, is to proceed and close up the business of the partnership: Note to *Childs* v. *Hyde*, 77 Am. Dec. 115; note to *Laughlin* v. *Lorenz*, 86 Id. 600.

CONTRACTS — LEX LOCI, LEX FORI. — The validity of a contract is to be determined by the law of the place where it is made, while its effect must be, as a general rule, governed by the law of the place where it is to be performed: Note to *Ford* v. *Buckeye Ins. Co.*, 99 Am. Dec. 668. *Lex loci* governs as to the obligations of a contract, and the *lex fori* as to the proof of the contract: *Downer* v. *Chesebrough*, 36 Conn. 39; 4 Am. Rep. 29; *Succession of Wilder*, 22 La. Ann. 219; 2 Am. Rep. 721; *Ivey* v. *Lalland*, 42 Miss. 444; 2 Am. Rep. 606; *Carson* v. *Hunter*, 46 Mo. 467; 2 Am. Rep. 529; *Knowlton* v. *Erie R'y Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *Dyke* v. *Erie R'y Co.*, 45 N. Y. 113; 6 Am. Rep. 43; *Hoadley* v. *Northern Tr. Co.*, 115 Mass. 304; 15 Am. Rep. 106; note to *Satterthwaite* v. *Doughty*, 59 Am. Dec. 557–559; note to *Chapman* v. *Robertson*, 31 Id. 270. The legality of an agreement made in New York respecting railroad bonds involved in a suit in Alabama, when the agreement is to be performed in the latter state, would probably be governed by the laws of Alabama: *Gilman* v. *Jones*, 87 Ala. 691.

FOREIGN ASSIGNMENT FOR BENEFIT OF CREDITORS. — An assignment for the benefit of creditors of property in South Carolina, made by the owner in accordance with the law of his domicile in another state, will not be recognized when in direct conflict with the laws of South Carolina: *Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749, and note.

Western Union Telegraph Company *v.* Dubois.

[128 Illinois, 248.]

Telegraph Companies — Liability for Negligence. — The receiver of a telegraphic dispatch may maintain an action against the company, through whose negligence the message has been altered or changed, for such loss or damage as he has sustained by reason of having been led to act upon the dispatch, and proof of such alteration is *prima facie* proof of the negligence of the company. It must then assume the burden of showing that the error was caused by an agency for which it is not liable.

Telegraph Companies — Remedy against, for Negligence. — Where no contract relation exists between the receiver of a dispatch and the telegraph company, the remedy of the former for negligence in transmitting the message is in an action of tort.

Telegraph Companies are Common Carriers and public servants, and are bound to act whenever called upon, their charges being paid or tendered. The extent of their liability is to transmit correctly the message as delivered.

Telegraph Companies — Liability for Negligence, and Measure of Damages. — When the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by a telegraph company, he may recover damages in tort. In such a case, the measure of damages is compensation for his actual loss, following as the natural and proximate consequence of the company's act.

Gross and Broadwell, for the appellant.

Tipton and Moffett, for the appellee.

Magruder, J. In the fall of 1887 appellee kept a restaurant and hotel in Gibson, Illinois. He had bought a car-load of apples, at some time during the fall, from I. H. Moore, of North Java, New York, at $1.50 per barrel. About October 1, 1887, he wrote a letter to Moore, asking if another car-load could be furnished at the same price. On October 5, 1887, Moore answered the letter by sending a telegram. The telegram so sent, when received by appellee, read as follows: "Letter received. Can load car-load of best winter fruit at $1.55. Answer." Appellee replied on the same day that he would accept the offer contained in the telegram, and sent Moore a draft for $200 to apply on the purchase, Moore requiring such a deposit to insure the consummation of the bargain.

The telegram, as delivered by Moore to the appellant company for transmission to the appellee, read as follows: "Letter received. Can load car-load of best winter fruit at $1.75. Answer." The error, by which the figures were made to read $1.55 instead of $1.75, was the fault of appellant. Appellee did not discover the mistake until after the $200 had

been paid, and after Moore had shipped the apples. When the car arrived in Gibson it contained 187 barrels of apples, which were green fruit. Moore sent to the bank at Gibson a draft for the balance of the purchase at $1.75 per barrel with the bill of lading attached. The bill of lading was to be delivered to appellee upon payment of the draft, so that appellee could not get the bill of lading, or possession of the apples, without paying the draft. Thereupon he paid the draft, which, with the amount previously paid, was twenty cents per barrel more than the price at which he had bought the apples, as stated in the telegram received and acted upon.

Appellee brought this suit before a justice of the peace for damages resulting to him from the mistake of the appellant in transmitting the message, and recovered $37.40, being twenty cents per barrel on the 187 barrels. On appeal to the circuit court, where the trial was had before the court without a jury, judgment was entered in favor of appellee for one cent damages. Both parties excepted to the judgment of the circuit court, and prayed an appeal to the appellate court, where errors were assigned on both sides. The appellate court reversed the judgment of the circuit court upon the cross-errors assigned by the appellee, and remanded the cause. Thereupon appellant made a motion to modify the judgment of reversal, so as to make said judgment final, and with directions to the circuit court to render judgment against appellant for $37.40, and costs, which motion was allowed, and judgment entered accordingly. Upon petition by appellant, the appellate court granted a certificate that the case involves questions of law of such importance, on account of collateral interests, as that the same should be passed upon by the supreme court, and allowed an appeal to this court.

In England, the doctrine is, that the receiver of a telegraphic dispatch cannot sue the telegraph company, on the ground that the obligation of the company springs entirely from contract, and that the contract for the transmission of the message is with the sender of it. This doctrine, however, has never prevailed in the United States. Here, it is well settled that the receiver of the dispatch may maintain an action against the telegraph company, through whose negligence the message has been altered or changed, for such loss or damage as he has sustained by reason of having been led to act upon the dispatch. Proof of the alteration or change is *prima facie* evidence of the negligence of the company. The burden rests

upon the company to show that the error was caused by some agency for which it is not liable: *Western Union Tel. Co.* v. *Tyler*, 74 Ill. 168; 24 Am. Rep. 279. There is no doubt that appellee has a right of action against appellant under the facts above stated. The only question is as to the form of the action.

If the action must be in tort or case, this suit was improperly brought before a justice of the peace, because, under our statute, justices of the peace have no jurisdiction in actions on the case for such an injury as is here involved.

The original contract for the transmission of the message was made between Moore and the company. It does not appear, however, that there was any contract, express or implied, between appellee and the company, nor was there any contract relation of any kind between them. Under some of the authorities, where the sender of the dispatch is the agent of the party to whom it is sent, or where the contract between the sender and the company is for the benefit of the party to whom the message is sent, the latter may sue the company in *assumpsit*. But here the relation between Moore and the appellee was that of vendor and vendee. Moore wanted to sell his apples, and the proof shows that he paid for the telegram himself. He made the contract with the company for the transmission of the message in his own interest, and to effect a sale of his own property. We do not think, therefore, that appellee was entitled to bring against the company any action based upon the existence of a contract relation between him and the company. His remedy is in tort.

Telegraph companies are the servants of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered: *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. Hence, when the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is an action on the case.

The damages in such case should be for an amount which will compensate the plaintiff for his actual loss. They must be in satisfaction of the natural and proximate consequence of the defendant's act. In the present suit, appellee would

not have bought the apples if he had known that their price was $1.75 per barrel. The facts — that he did not discover the mistake until after the apples had been shipped, that he had already advanced $200 towards their purchase, that he could not obtain possession of them without paying the balance of the purchase price at the rate of $1.75 per barrel, that they were perishable property, liable to be lost by the natural process of decay, if the delay in unloading them should be too great, and that appellee needed them in his business, having already disposed of a car-load on hand in order to make room for the present consignment — authorized him to pay the extra twenty cents per barrel, and look to the appellant for reimbursement. He was justified in relying upon his own judgment to make the loss as small as possible. Under the circumstances, as thus detailed, his judgment was a reasonable one.

We think the appellate court did right in fixing the amount of damages at $37.40. But the distinctions between common-law actions are still recognized in this state. The jurisdiction of justices of the peace is, in large measure, based upon and limited by such distinctions. It is our duty to recognize them. Inasmuch, therefore, as appellee has pursued the wrong remedy, and before the wrong tribunal, the judgment must be reversed.

TELEGRAPH COMPANIES. — As to the liability of telegraph companies for negligence with respect to the transmission and delivery of messages, and the remedy against them therefor: *McCord* v. *Western Union Tel. Co.*, 39 Minn. 181; 12 Am. St. Rep. 636, and note; *Clay* v. *Western Union Tel. Co.*, 81 Ga. 285; 12 Am. St. Rep. 316, and note; *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, and note.

RAYMOND *v.* VAUGHN.

[128 ILLINOIS, 256.]

PARTNERSHIP. — INSANITY OF ONE PARTNER DOES NOT, PER SE, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. This will not be done if the malady is temporary only, with a fair prospect of recovery within a reasonable time.

PARTNERSHIP — EFFECT OF INSANITY OF PARTNER. — An adjudication by the county court that one partner is temporarily insane does not dissolve the partnership; and upon a bill filed for that purpose, it has no other effect than to establish the insanity. In such case equity will look to the effect produced upon the partnership relations, and refuse to dissolve

them and apply the assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation.

PARTNERSHIP — PARTNER EMBRACES CHARACTER OF BOTH PRINCIPAL AND AGENT. — For himself, with respect to the partnership, he acts as principal, and agent for his partners, with an interest in all that pertains to the business of the firm. If, therefore, for any reason, one member of the firm assumes control, he must, while so controlling, manage for and in the interest of all the partners. His duty is analogous to that of a trustee, and he is not allowed to derive personal profit from the use of the partnership assets or business or good-will of the firm.

PARTNERSHIP — EFFECT OF INSANITY OF PARTNER. — After an adjudication of the insanity of one partner, the continuing partner may apply for a dissolution of the partnership if he so desires; or if it is a partnership at will, he may dissolve it of his own volition.

PARTNERSHIP — EFFECT OF CONTINUING BUSINESS AFTER INSANITY OF ONE PARTNER. — Where one partner has been adjudged insane, and the remaining partner continues the business as before, without objection or notice to any one, it is presumed that he did not intend a dissolution of the firm, but that he waited to determine whether the incapacity of his partner would prove merely temporary, and it would become practicable for him to resume business. So long as he thus continues to carry on the business, without seeking to dissolve the partnership, there is no dissolution, nor is he excused from accounting for the profits derived by him from the business of the firm.

NOTICE. — CLAIM CANNOT BE BARRED by a proceeding in which it was in no way involved, and of which the party to be estopped had no notice.

Flower, Remy, and Gregory, for the plaintiff in error.

John Gibbons, for the defendant in error.

SHOPE, J. This was a bill filed by defendant in error, Vaughn, against Samuel B. Raymond, plaintiff in error, to compel an accounting in respect of partnership affairs alleged to exist between them. The answer of Raymond expressly admits the formation of the copartnership, as alleged in the bill, and its continuance from September 15, 1874, to the twentieth day of January, 1876, when the complainant, Vaughn, was adjudged insane. It will therefore be unnecessary to discuss the question of the partnership, further than may become important in illustrating other branches of the case.

It is insisted by counsel for plaintiff in error, if the partnership existed, — 1. That it was *ipso facto* dissolved by the adjudication of the insanity of Vaughn by the county court of Cook County on the twentieth day of January, 1876, and that plaintiff in error, as conservator of Vaughn, accounted for all the property of Vaughn, and all his rights and credits accruing from the copartnership prior to said date, in settlement

of Vaughn's estate in said court, and that, the partnership being dissolved, Vaughn has no claim, legal or equitable, to the proceeds of the partnership business after such dissolution; 2. If this is not so, the partnership being determinable at the will of either party, Raymond elected to determine the partnership, and did terminate it at the date of the adjudication of insanity, and that such dissolution can be inferred from circumstances, and that the circumstances proved show such election by him; 3. That the discharge, by the county court, of Raymond, as conservator of Vaughn, upon his final report as such conservator, is a bar to the relief sought by the bill in this case so long as it remains unreversed; and 4. That, in any event, by a settlement made between the parties in Philadelphia, in June, 1879, Vaughn received of Raymond two thousand five hundred dollars in full satisfaction and discharge of his interest in the business and profits of such copartnership.

The first contention presents questions of the most difficulty. It is said in Parsons on Contracts, 465: "There are not wanting strong reasons and high authority for the conclusion that insanity, certain, complete, and hopeless, of itself and at once dissolves the partnership; but we think the decided weight of authority, in England and this country, opposes this conclusion, and holds that the partnership continues until it is dissolved by decree."

Chancellor Kent (3 Kent's Com. 58) says: "Insanity does not work a dissolution of partnership *ipso facto*. It depends upon circumstances, under the sound discretion of the court of chancery. But if lunacy be confirmed and duly ascertained, it may now be laid down as a general rule, notwithstanding the decision of Lord Talbot to the contrary, that, as partners are, respectively, to contribute skill and industry, as well as capital, to the business of the concern, the inability of a partner, by reason of lunacy, is a sound and just cause for the interference of the courts of chancery to dissolve the partnership, and have the account taken, and the property duly applied." And the same author (2 Kent's Com. 645) says: "In cases of partnership, it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy."

Story, in his work on partnership, section 295, says: "The common law, . . . upon grounds of public policy or convenience, holds that insanity does not ordinarily, *per se*, amount to a positive dissolution of the partnership, but only to a good

and sufficient cause for a court of equity to decree a dissolution." This writer, however, adds: "We say 'ordinarily,' for when the insanity has been positively ascertained under a commission of lunacy, or by the regular judicial appointment of a guardian to the lunatic, it may deserve consideration, whether it does not *ipso facto* amount to a clear case of dissolution of the partnership by operation of law, since it immediately suspends the whole function and right of the party to act personally." Mr. Justice Parker, in *Davis* v. *Lane*, 10 N. H. 161, makes the same suggestion. That case was, however, upon the effect of insanity in revoking the power of an agent to act for his principal. Mr. Parsons, also, seems to be of the opinion that the courts would hold that where the insanity was determined by due inquest, it would, *per se*, operate as a dissolution of the partnership. Both Story and Parsons refer, in support of this latter suggestion, to the case of *Isler* v. *Baker*, 6 Humph. 85, alone, to sustain the text. That case holds the doctrine indicated by Mr. Parsons, but stands, so far as we have been able to find, unsupported by any adjudicated case, and none are cited by the court in support of its conclusion. Collyer on Partnership, volume 2, chapter 3, section 3, and Gow on Partnership, chapter 5, section 1, each lays down the rule that a decree of a court of chancery is necessary to a dissolution of the partnership, notwithstanding there has been an adjudication declaring one partner a lunatic.

In *Besch* v. *Frolich*, 1 Phill. Ch. 172, one of the partners had been adjudged insane upon commission of lunacy. Upon bill filed to dissolve the partnership, it was insisted that it should be decreed dissolved from the time of the incapacity of the insane partner. This the court (Lord Chancellor Cottenham delivering the opinion) held could not be done, and says, "that there are three considerations between partners: the share of each in the capital stock, the share of each in the good-will, and the labor which each undertakes to devote to the business. Your argument is, that because one of these considerations (and that, perhaps, the least valuable of the three) fails, you are entitled from that time to take to yourself the whole benefit of the other two. . . . . Whatever delay has occurred is imputable to the plaintiff himself. It was competent for him to have filed his bill at any moment since the time when his partner first became incapable of attending to business."

In *Jones* v. *Noy*, 2 Mylne & K. 125, the partners were solicitors. One of them (Hardston) became insane and incapable

of attending to business, and died two or three years afterwards. Noy, the other partner, carried on the business one or two years, and then sold it out. Hardston's executors filed a bill to compel Noy to account in respect to the partnership business and the proceeds of the sale. Sir John Leach, M. R., in determining the cause, said: "It is clear, upon principle, that the complete incapacity of the parties to the agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is ground for the dissolution of a partnership, because it is immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he thinks fit, make it a ground of dissolution; but in that case I consider, with Lord Kenyon, that, in order to make it a ground for dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See also *Griswold* v. *Waddington*, 15 Johns. 57; *Bagshaw* v. *Parker*, 10 Beav. 532; *Sadler* v. *Lease*, 66 Id. 624; *Robertson* v. *Lockie*, 15 Sim. 285; *Pierce* v. *Chamberlain*, 2 Ves. Sr. 33.

No further citation or analysis of authorities will be necessary. The rule, supported by the decided weight of authority and announcing the correct doctrine, is, that the insanity of a partner does not, *per se*, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine must be understood, and is applied by courts of equity with appropriate limitations and restrictions; for, while curable; temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, the appointment of a conservator, and commitment of the ward to an insane asylum, yet it will not authorize a court of chancery to decree a dissolution of a partnership if the malady be temporary only, with a fair prospect of recovery within a reasonable time: Story on Partnership, sec. 297.

Under our system, the adjudication of insanity may be had for the purpose of enabling those temporarily insane to avail

of the facilities for treatment and cure provided by the beneficence of the state. In such case, the adjudication of the county court is necessary to their admission to the State Hospital for the Insane, where, in theory at least, the curable only are admitted. It is manifest that the adjudication by the county court can have no effect in determining the partnership, and upon bill filed to dissolve the partnership, it would have no other effect than to establish the insanity. Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to determine the partnership, and apply its assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation. A partner embraces the character both of principal and agent. For himself, with respect to the concerns of the partnership, he virtually acts as principal, and as agent for his partners. His power to act for them is coupled with an interest in all that pertains to the business of the concern. It would seem, therefore, that if, for any reason, one member of the firm should assume control and management of the business and affairs of the partnership, he should, while so controlling it, manage it for all, and in the interest of all, the partners. His duty would not, perhaps, be strictly that of a trustee, but would be analogous to it, and he would not be allowed to derive personal advantage from the use of the partnership assets or business or good-will of the firm. This rule is universal in its application to fiduciary relations: *Bowen* v. *Richardson*, 133 Mass. 293; *Freeman* v. *Freeman*, 136 Id. 260; Perry on Trusts, secs. 127, 128, 455–464. At any time after the insanity of Vaughn, the continuing partner had, if he saw proper to exercise it, the right to apply for a dissolution of the partnership, or, as it was a partnership at will, might have dissolved it of his own volition.

There is much evidence in the record tending to show that, some time prior to January 20, 1876, Vaughn became deranged, but remained seemingly conscious of his own incapacity for business. Upon consultation with Raymond, they went together to an asylum near Chicago to consult a physician as to the best course to pursue, and it was agreed and determined that application be made to the county court to have Vaughn adjudged insane. Vaughn testifies (and there is much in this record to corroborate his statement) that it was agreed by Raymond, in view of his going to the asylum to be treated for

his malady, that he (Raymond) would look after and attend to the business of the firm, and carry it on in his absence. It is not, however, necessary to put the case upon that ground, for it does clearly appear that Raymond, without objection or any notice to any one, continued the business precisely as before, and the presumption is, that he did not intend a dissolution of the firm. It is to be presumed, in the absence of evidence showing to the contrary, that he waited to determine whether the incapacity of his partner would prove temporary merely, and it become practicable for him to resume business. So long as he thus continued to carry on the partnership business without taking steps to dissolve the partnership, there could be no dissolution, or he be excused from afterwards accounting for the profits actually derived by him from the business of the firm. The circumstances relied upon as showing an election by Raymond to dissolve the copartnership are wholly insufficient. On the contrary, it appears that these parties were brokers; that for a number of years prior to the formation of this partnership Vaughn had represented, as broker in the wholesale sugar market in Chicago, the Franklin Sugar Refinery of Philadelphia, Pennsylvania, whose business was there conducted by Harrison, Havemeyer, & Co. It also appears that Raymond had been likewise engaged as a broker in sugars, in Chicago, he representing two or more sugar refineries in the East, each of the parties having realized considerable sums, by way of commissions, in the course of their business. By an arrangement between them, they consolidated their business, Vaughn receiving one third and Raymond two thirds of the profits, and they were to share losses and expenses in the same proportion. Each, however, remained the broker of the refineries that they had previously represented, — that is, Vaughn represented the Franklin Sugar Refinery, and no change was made in the agency whatever. After Vaughn was adjudged insane, instead of dissolving the copartnership, or doing any act showing an intent so to do, Raymond continued to carry on the business, in all respects, as before. Vaughn still continued to be the broker of the Franklin Sugar Refinery, and that concern had no notice of any change in its brokers at Chicago. It is shown that a very large business was done by Raymond acting in the name of Vaughn as broker of said refinery, and large profits were received by him therefrom. Vaughn had brought the business of the Franklin Sugar Refinery to the firm. No confidence

had been reposed by this principal in Raymond, he at no time having acted as individual broker of that refinery. It was not until after Vaughn's discharge from the asylum that Harrison, Havemeyer, & Co. had any notice or intimation that Raymond pretended that a dissolution of the firm had taken place; and then, as it is clearly shown, to induce Harrison, Havemeyer, & Co. to make him their broker at Chicago, and to induce Vaughn to give up and surrender the business in that city, Raymond paid Vaughn two thousand five hundred dollars. Negotiations were had between these parties through Mr. Harrison, of the firm of Harrison, Havemeyer, & Co., and his testimony leaves no doubt that the payment of said sum of two thousand five hundred dollars by Raymond to Vaughn was for a surrender by Vaughn to Raymond of his (Vaughn's) right to act as broker for the Franklin Sugar Refinery in the Chicago market. We cannot undertake to review this evidence in detail, but it leaves no question in our mind that the dissolution of the firm did not take place at any time prior to the settlement before spoken of, in respect to the future conduct of the business.

Upon the questions remaining to be considered, the appellate court, by McAllister, J., said: "The next position taken in argument by appellant's counsel is, that the discharge of appellant by the county court, upon rendering his final account there as conservator, was a proceeding *in rem*, and, so long as it remains unreversed, is a complete bar to the relief sought by this bill, upon the principle of *res judicata*. That proceeding, so far as it relates to the adjudication as to the *status* of appellee, was, in our opinion, in the nature of a proceeding *in rem*. But the matters upon which the right to and claim for an accounting is based were of a wholly different nature. This claim was not included in the inventory which appellant made as conservator, nor mentioned in his final accounting, upon which he was discharged. Passing upon it was in no respect necessary to the exercise of the jurisdiction of the court in the first instance, nor was it directly involved, or a necessary incident to any adjudication made. It was a matter of mere private, individual right between these two parties, over which a court of chancery has jurisdiction, and over which, if the county court had any jurisdiction, it was in no sense exclusive. Besides, appellee was, at the time, confined in a lunatic asylum, and had no notice, actual or constructive. The distinction between those matters which are

necessarily involved in a proceeding *in rem*, or in one in the nature of a proceeding *in rem*, as to which the decree is conclusive against all the world, and matters *inter partes*, or of mere private litigation, is recognized by the authorities, and has its foundation in the nature of things: 2 Smith's Lead. Cas., 7th Am. ed., 632; 1 Greenl. Ev., sec. 550. To hold a claim barred by a proceeding in which it was in no wise involved, and of which the party to be estopped had no kind of notice, would be to subvert and trample upon some of the most essential fundamental principles upon which the doctrine of the conclusiveness of judgments and decrees is based, because appellee never had his day in court as to this claim. We are of opinion that the transaction between the parties, in May, 1879, at Philadelphia, falls entirely short of a settlement of the claim, so as to bar appellee's right to an accounting. This claim, and the matters out of which it arises, were none of them mentioned by either party."

We are entirely satisfied with what is there said, and adopt the views of that court.

We find no error in this record, and the judgment of the appellate court will be affirmed.

PARTNERSHIP — PARTNER PERSONALLY INCAPACITATED BY INSANITY. — Insanity does not *ipso facto* dissolve a partnership, but upon the confirmed lunacy of a partner his copartners may base a petition for a dissolution of the partnership: Note to *Slemmer's Appeal*, 98 Am. Dec. 266, 267.

POWER OF ONE PARTNER TO BIND THE FIRM. — One partner is the agent of the firm within the general scope of the partnership business: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299, and particularly note 304.

HAWARD *v.* PEAVEY.

[123 ILLINOIS, 430.]

EQUITABLE CONVERSION IS THAT CHANGE IN PROPERTY by which, for certain purposes, real estate is considered as personal, and personal as real, and transmissible and descendible as such, and there must be an absolute intention and direction that the conversion is to be made, in order to create it; but it is not essential that an express declaration to that effect be made in the instrument; it may arise by necessary implication from the nature of the instrument or the language employed.

EQUITABLE CONVERSION CAN ONLY TAKE PLACE when the property remains unchanged in form, from a clear and imperative direction to convert it. If this is left to the option, direction, or choice of trustees or others, no equitable conversion will take place.

EQUITABLE CONVERSION. — Where a will provides that land may be sold under certain conditions, and gives executors power to sell, and, in case of sale, limits the possible purchasers to certain persons, unless the sale is actually made under the power, no equitable conversion takes place, because there is no absolute requirement in the will that the sale shall take place.

CONTINGENT REMAINDER. — Where a will provides that upon the death or remarriage of the widow of the testator the executors shall proceed to divide his estate among his children, or such of them "as may be then alive, or the lawful issue of such of them as may be dead leaving lawful issue," each child, or if dead, his issue, takes only a contingent remainder dependent upon the termination of the particular estate, and upon his or their being alive at that time.

REMAINDER IS VESTED WHEN A PRESENT INTEREST PASSES to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates.

CONTINGENT REMAINDER IS ONE LIMITED TO TAKE EFFECT, either to a dubious or uncertain person, or upon a dubious and uncertain event.

EVERY ESTATE IN REMAINDER SUBJECT TO A CONTINGENCY OR CONDITION is not necessarily a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened and thereby becomes certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition.

CONTINGENT REMAINDER IS NOT SUBJECT TO LEVY AND SALE against the party entitled to it, and no title passes to a purchaser by sheriff's deed.

Duncan and Gilbert, for the appellants.

L. Leland, for the appellee.

BAILEY, J. The petitioner in this case claims title in fee to an undivided one fourth of the land in question by virtue of the sale under execution of Robert Haward's interest therein, and the decree can be sustained only upon the theory that, at the time of the levy and sale, Robert Haward was the owner of an estate in said land subject to execution. The appellants insist that Robert Haward at that time had no vested interest in the land, and in support of their contention they submit two propositions, viz.: 1. That by the will of James Haward, deceased, said land was directed to be converted into money, and the money divided among his sons, thus working an equitable conversion of the land, *eo instanti*, upon the death of the testator. 2. If there was no conversion, the interest given to Robert Haward by the will of his father was not a vested but a contingent remainder, and that such remainder did not become vested until after said levy and sale. It must be admitted that if either of these propositions can be sustained, the sale under the execution was nugatory, and vested no title in the purchaser.

Did the will of James Haward operate as an equitable conversion of said land? Conversion has been defined to be, that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such. It is an application of the maxim that equity regards that as done which ought to be done. It is not essential that there should be an express declaration in the instrument that the land shall be treated as money, although not sold; or that the money shall be treated as land, although not actually laid out in the purchase of it. Such direction may arise by necessary implication from the nature of the instrument or the language employed. But there must be an expression, in some form, of an absolute intention that the land shall be sold and turned into money, or that the money shall be expended in the purchase of land. The test is, Has the will or deed absolutely directed that the conversion be made? In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. If the act of converting is left to the option, discretion, or choice of the trustees or others charged with making it, no equitable conversion will take place, because no duty to make the change rests upon them: 3 Pomeroy's Eq. Jur., secs. 1159 et seq., and authorities cited. In *Anewalt's Appeal*, 42 Pa. St. 414, the court lays down the rule, in language quoted from the standard authorities, as follows: "To establish a conversion, the will must direct it absolutely or out and out, irrespective of all contingencies. The direction to convert must be positive and explicit, and the will, if it be a will, or the deed, if it be by contract, must decisively fix upon the land the quality of money. It must be an imperative direction to sell."

Does the will of James Haward contain an absolute direction, either in express terms or by implication, to convert the land of the testator into money, and distribute it among his sons in that form, so as to leave to his executors no discretion on that subject? Said will assumes to deal with both real and personal estate, and as we have no information on the subject outside of the will, we may assume that the testator, at the time of his death, was the owner of personal as well as real property. The will gives all his property, both real and personal, to his executors, in trust, for the benefit and support of the testator's wife so long as she should remain his widow, and it was provided that the widow and certain of the sons

might, if they thought best, carry on the farm or a part of it, or if they wished to give up farming, the executors were authorized to sell his personal property and invest the proceeds, and rent the land, paying to the widow the rent and the interest on the money invested. The direction to convert the land into money, if it exists at all, must be found in the following clause of the will: "On the death of my wife, or in the event of her marrying again, my executors shall then proceed to divide the property among my children. To my son William I give two hundred dollars as his share, as I think he is better provided for than the others, and the land I wish kept in the family, and my executors may sell it to any of the boys at its full value, and the proceeds of my property, both real and personal, to be divided among my children, William, as above mentioned, two hundred dollars, and the residue equally divided between such of my children, George, Robert, James, and Thomas, as may be alive, or the lawful issue of such of them as may be dead leaving lawful issue."

By this clause the executors were clearly given a power of sale, the persons who might become purchasers being limited, however, to the testator's sons, the reason of such limitation being the testator's desire to keep the land in the family. But we fail to find any provision which, either expressly or by implication, made it imperative that the executors should exercise that power. Said clause first provides in terms for a division of the property among the testator's sons upon the termination of the widow's equitable estate. That provision standing alone would have made it imperative upon the executors to divide the property as it stood without a sale. But it being the testator's desire that his land should remain in his family, he provided further that his executors might sell the land to one of his sons, if any one of them was willing to buy and pay its full value, and make distribution by dividing the proceeds. It seems clear that the power of sale was given as an alternative, and not as the exclusive mode of making division of the property. The testator's wish that the land should be kept in the family seems to have furnished a governing principle in draughting the will, and that wish would be equally well accomplished by dividing the land itself among his sons, or by selling it to one of them and dividing the proceeds.

It should also be observed that the language of the will does not require the land to be sold, but only provides that it

may be sold, and in case of sale the possible purchasers were limited to five persons. Because of such limitation it became necessary to provide that the purchaser should pay the full value of the land, for otherwise it might be sacrificed by reason of a lack of competition. It would have been repugnant to the very purpose for which a sale was permitted to allow the land to be sold to a stranger, as that would manifestly have taken it out of the family. If no one of the sons, therefore, had been willing to purchase and pay its full value, the power of sale could not have been executed. In that case the only division possible would have been a division of the land.

An argument is sought to be based upon the following phrase of the clause of the will above quoted, viz., "the proceeds of all my property, both real and personal, to be divided among my several children," etc. That language is a part of the provision permitting a sale, and its force is merely that, in case of a sale, the proceeds should be divided. It clearly was not intended to apply to the division in case the land itself should be divided.

Nor can we perceive any special significance, as bearing upon the question under consideration, of the last clause of the will which provided that, "if any of my sons have any money advanced for them to begin with, the others must be made equal to them at the division of the property." It is not claimed that any such advances had been made by the testator in his lifetime, and the language here quoted must be deemed to have reference to possible advances made to the sons by the executors, or it may be by the widow, out of the personal estate, during the lifetime of the widow. We are unable to see how an adjustment of such advances was not quite as practicable under one mode of division as under the other. Even if there was not sufficient personal estate for the purposes of such adjustment, and it is not shown that there was not, the necessity of making it would interpose no obstacle to the division of the land without a sale.

We are of the opinion that there was no absolute requirement in the will that the land should be sold, but that the sale was left to the discretion of the executors, and as no sale was actually made under the power, there was no equitable conversion of the land.

The lands of James Haward, deceased, being devised to his executors to be held in trust for his widow during widowhood, and then to be divided among his children, the four sons

specially named in the will took only an estate in remainder; and the material question here is, whether the remainder devised to his son Robert was, at the time of the execution sale, vested or contingent. The proposition is not controverted, that if it was merely contingent, it was not subject to sale on execution. This proposition seems to be supported by the following authorities: *Watson* v. *Dodd*, 68 N. C. 530; *Jackson* v. *Middleton*, 52 Barb. 9; *Baker* v. *Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600; Freeman on Executions, sec. 178.

The will provides that, upon the death or remarriage of the widow, the executors shall proceed to divide the estate of the testator among his children; but in fixing the mode in which the division shall be made, it provides that William shall be given two hundred dollars in money as his share, "and the residue equally divided between such of my children, George, Robert, James, and Thomas, as may be then alive, or the lawful issue of such of them as may be dead leaving lawful issue."

A remainder is said to be vested where a present interest passes to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates; while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event: 2 Bla. Com. 168. This definition is adopted, in substance, by all the text-writers, and is sufficiently accurate. But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened, and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition: *Bromfield* v. *Crowder*, 1 Bos. & P. 313; *Blanchard* v. *Blanchard*, 1 Allen, 223; *Manice* v. *Manice*, 43 N. Y. 380; Washburn on Real Property, 4th ed., 579. It is plain that, in the present case, the estate devised was, so far as Robert Haward was concerned, subject to a contingency, viz., his being alive at the time the particular estate should be determined by the death or remarriage of the widow. Whether this contingency constituted a condition precedent or subsequent must be determined by the language of the will.

While the proper construction of the will is not a matter wholly free from doubt, it seems to be clear that the intention

of the testator was not to devise to his son Robert a present estate subject to be defeated in case of his death before the termination of the particular estate, but to make the estate itself conditional upon his being alive at that time. The devise was not to him, nor to him and his three brothers, but only to such of the four as should be alive at the death or remarriage of the widow. If one or more of the sons named had died before the death of the widow, it would have been doing violence to the language of the will to hold that any estate was thereby vested in them. They would have been excluded by the very terms of the will from the number of those named as beneficiaries. The persons to whom the estate would go being wholly uncertain during the continuance of the particular estate, it must be held that the contingency named, viz., that the persons who were to take the estate should be alive at the death or remarriage of the widow, was a condition precedent to the vesting of the estate, and that until the condition happened, the estate was necessarily contingent.

The cases to be found in the reports, so far as they can aid us in the interpretation of the will under consideration, seem to support the view we have here expressed. In *Olney* v. *Hull*, 21 Pick. 311, the testator, after devising to his wife the use of his real estate while she remained his widow, proceeded as follows: "Should my wife marry or die, the land shall then be equally divided among my surviving sons, with each son paying sixty dollars to my daughters, to be equally divided among them, as soon as each son may come into possession of said land." It was held that, until the death or marriage of the widow, it was uncertain who would be alive to take, and therefore that no estate vested in any one before that event happened.

In *Nash* v. *Nash*, 12 Allen, 345, the testator devised the use of his real estate to his wife during life, and at her death the fee to such of his children as might be then living, share and share alike; and it was held that, during the life of the widow, the estates given to the children were contingent, and not vested.

In *Thomson* v. *Ludington*, 104 Mass. 193, the testator gave his estate to his widow during life or widowhood, and directed that at her decease or marriage the estate should be divided "equally to and among such of my children as shall then be living, share and share alike; the names of my said children

are George C., Ann L., Lucy M., Francis H., and Caroline E., to them and to their heirs and assigns forever." It was there held that the will gave only a contingent remainder to such of the children as should happen to be living when the contingency of such death or marriage happened.

The case of *Blanchard* v. *Blanchard*, 1 Allen, 223, may be referred to as a fair illustration of a vested remainder liable to be divested by the happening of a condition subsequent. There the testator devised to his wife all the income of all his real and personal property, and then devised as follows: "I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property, both real and personal, that may be left at the death of my wife, to be divided equally between the five last-named children. And provided, furthermore, that if any of the last five-named children die before my wife, then the property to be equally divided between the survivors, except they should leave issue; in that case, to go to said issue, provided the said issue be legitimate." The testator had ten children, all of whom survived the wife. The court held that the portion of the clause above quoted preceding the proviso presented the ordinary case of a devise to the wife for life, remainder in fee at her death to five of her children, to be equally divided between them. There being in that portion of the devise no words of contingency, such as "if they shall be living at her death," or "to such of them as shall be living," the usual and proper phrases to constitute a condition precedent, a vested remainder was created in the children named as tenants in common. In construing the proviso, it was admitted that if its effect was to limit the remainder to such of the children named as should survive their mother, the remainder would be contingent; but it was held, after a full review of the authorities, that the proviso merely introduced into the devise a condition subsequent, and that the remainder was vested, subject to be divested upon the happening of the condition.

The foregoing cases sufficiently illustrate the principles upon which the will in this case must be construed. The devise was to such of four persons as should be alive at the termination of the particular estate. Until that time arrived, it could not be told who were to be the beneficiaries of the devise. Until that time, the persons to take were not, and could

not be, identified, and until that time it was wholly uncertain whether Robert Haward was one of them or not. It follows that, at the time the land in question was sold under execution, Robert Haward's interest was only a contingent remainder, which was not subject to levy and sale, and that no title therefore passed to the purchaser by the marshal's deed.

An attempt is made to distinguish this case from the cases above cited upon the fact that in this case the four possible beneficiaries of the devise were mentioned by name, while in the cases cited, or in most of them, the devise was to the children who should be alive at the termination of the particular estate as a class. Even that distinction does not exist between this case and *Thomson* v. *Ludington*, *supra*, as there the children were all mentioned by name, and it is not even suggested there that that fact made any difference with their rights. But we are unable to see how there can be any greater degree of certainty in the designation of the beneficiaries where all the persons in the class are mentioned by name, than where they are simply designated as a class, so long as the devise is only to such of the persons named, or of the class, as may be alive at the expiration of the life estate. The contingency grows out of the use of the words "to such of them as shall be living," which, as said in *Blanchard* v. *Blanchard*, *supra*, is a proper phrase to constitute a condition precedent.

The decree of the court below, finding that the petitioner is the owner in fee of an undivided one fourth of the lands sought to be partitioned, is unsupported by the evidence. The decree will therefore be reversed, and the cause remanded.

Decree reversed.

EQUITABLE CONVERSION. — As to the general principles with respect to the equitable conversion of realty into personalty, and personalty into realty, by the provisions in a will: *Ford* v. *Ford*, 70 Wis. 19; 5 Am. St. Rep. 117, and particularly extended note 141–148; note to *Chapman* v. *Charleston*, 13 Id. 681.

REMAINDERS, CONTINGENT AND VESTED. — A vested remainder is distinguished from a contingent remainder by the present capacity of taking effect in possession, if the possession were to become vacant: *Mercantile Bank* v. *Ballard*, 83 Ky. 481; 4 Am. St. Rep. 160, and cases in note; *Manderson* v. *Lukens*, 23 Pa. St. 31; 62 Am. Dec. 312, and cases cited in note; and for applications of this rule, see *Hudgens* v. *Wilkins*, 77 Ga. 555; *Hoover* v. *Hoover*, 116 Ind. 498; *Bruce* v. *Bissell*, 119 Id. 525; *Bailey* v. *Love*, 67 Md. 592; *In re Crossman*, 113 N. Y. 503; *Grosvenor* v. *Bowen*, 15 R. I. 549; *Land Co.* v. *Hill*, 87 Tenn. 589. But where the vesting of an estate is dependent upon the happening or non-happening of a contingency, the remainder is not vested, but contingent: *Preston* v. *Brant*, 96 Mo. 552; *Hodges* v. *Fleetwood*, 102 N. C. 122; *Shadden* v. *Hembree*, 17 Or. 15.

HUESING *v.* CITY OF ROCK ISLAND.

[128 ILLINOIS, 465.]

MUNICIPAL CORPORATIONS — GENERAL POWERS. — A municipal corporation can only exercise such powers as are expressly granted, or those necessarily or fairly implied in or incident to the former, and those which are essential and indispensable to the declared objects and purposes of the corporation.

MUNICIPAL CORPORATIONS — EXERCISE OF GENERAL AND SPECIAL POWERS. — An express grant of power to pass ordinances upon a special subject, limited by the terms of the grant, in extent, object, or purpose, or in reference to the mode in which it may be exercised, excludes all power to legislate upon that subject, beyond the prescribed limits, unless a contrary intent appears from the act.

MUNICIPAL CORPORATIONS — EXERCISE OF GENERAL AND SPECIAL POWERS. — Where both general and special powers are granted by the act of incorporation, the power to pass by-laws or ordinances relating to health and sanitary matters under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the act. The power to pass such by-laws under the general grant does not enlarge or annul the power granted by the special clause in relation to its various matters, but gives authority to pass reasonable by-laws upon all other matters within the scope of municipal authority.

MUNICIPAL CORPORATIONS — POWER TO MAINTAIN ABATTOIR. — The legislature may, by appropriate legislation, authorize an incorporated town to maintain an *abattoir*, or public slaughter-house.

MUNICIPAL CORPORATIONS — POWER TO MAINTAIN PUBLIC SLAUGHTER-HOUSE. — Where power is specially conferred upon incorporated towns to prohibit slaughter-houses or any unwholesome business or establishment within their limits, and the common council of the town is authorized, by appropriate ordinance, to regulate the location of any unwholesome business, and to cleanse, abate, or remove the same, such power does not authorize the passage of an ordinance to appropriate public funds for the erection and maintenance of a public *abattoir*, or slaughter-house, nor is such power expressly or impliedly granted by the general incorporation act of Illinois.

Ira O. Wilkinson, William Jackson, and Charles Dunham, for the appellant.

William McEniry and E. D. Sweeney, for the appellees.

CRAIG, C. J. This was a bill in equity, brought by August Huesing, a resident and tax-payer of the city of Rock Island, to enjoin the municipal authorities of the city of Rock Island from maintaining an *abattoir*, or public slaughter-house, and appropriating the means of the city for that purpose. On the hearing in the circuit court, a decree was rendered in favor of the complainant in the bill, but on appeal to the appellate court, the decree was reversed, with directions to the circuit

court to dismiss the bill. To reverse the judgment of the appellate court, the complainant appealed to this court.

The city of Rock Island contains a population of about twelve thousand people, and is organized under the general incorporation law of the state. The city council procured, by gift, two acres of land in the city, and erected thereon a building where animals might be slaughtered for consumption in the city. On the seventh day of December, 1885, an ordinance was passed. The first section provides that the premises containing the two acres is designated and established as the city *abattoir*. Sections 2, 3, 4, 5, 6, 7, 9, and 10 of the ordinance are as follows:—

"Sec. 2. Said *abattoir* is established and shall be maintained for the sole use and purpose of so regulating the business of furnishing fresh meats to the inhabitants of said city as reasonably to secure to them good, fresh, wholesome meats.

"Sec. 3. The commissioner of health shall have the care, custody, charge, and management of the city *abattoir*, and it shall be his duty to see that the same is conducted in a clean and orderly manner, and that all the provisions, rules, and regulations adopted by the city council for the government and use thereof are enforced, and that the rights and privileges of all persons entitled to use the same are allowed and given, without discrimination or distinction; and in the conduct and management of said *abattoir*, the commissioner of health is hereby authorized and empowered to employ a deputy or deputies, the number and compensation of such deputies to be fixed and determined by the city council.

"Sec. 4. Every person licensed, under the ordinances of this city, to sell fresh meats, shall be entitled to use said *abattoir*, upon compliance with the provisions, rules, and regulations governing the use thereof.

"Sec. 5. If any person licensed, under the ordinances of this city, to sell fresh meats, shall, in the use of said *abattoir*, refuse or neglect to comply with the provisions, rules, and regulations governing the use thereof, the commissioner of health shall suspend such person from further use thereof, and shall forthwith report such suspension, and the cause thereof, to the city council for its action thereon.

"Sec. 6. Said *abattoir* shall be open for use for the inspection and slaughter of animals, each day, from four o'clock, A. M., to seven o'clock, A. M., and from two o'clock, P. M., to eight o'clock, P. M., during the period from May 1st to November 1st

and from six o'clock, A. M., to nine o'clock, A. M., and from eleven o'clock, A. M., to six o'clock, P. M., during the period from November 1st to May 1st.

"Sec. 7. Every person licensed, under the ordinances of this city, to sell fresh meats of cattle, hogs, sheep, calves, or lambs, shall, before offering such meats for sale, have the same inspected and approved by the commissioner of health, or his deputy, at the city *abattoir*, or at any licensed packing-house, or other place in this city licensed for the slaughter of animals; and it shall be the duty of said commissioner of health, in person or by deputy, to inspect meats at said places other than said *abattoir* at all reasonable hours, and to as fully as possible meet the convenience of persons asking such inspection."

"Sec. 9. All cattle, hogs, sheep, and calves, the flesh of which shall be desired to be sold by any person licensed to sell fresh meats within the limits of this city, shall be first inspected by the commissioner of health, or his deputy, at the city *abattoir*, or at any licensed packing-house, or other place in this city licensed for the slaughter of animals, before slaughter thereof, and before such flesh shall be sold or offered for sale by any person so licensed.

"Sec. 10. It shall be unlawful for any person licensed to sell fresh meats to sell or offer for sale within the limits of said city any fresh meats (except venison, poultry, fish, or wild game), unless the same has been first inspected and approved by the commissioner of health, or his deputy, as herein provided."

Several questions of a technical character have been raised and discussed in the argument, but in the view we take of the record, there is but one question of any importance presented, and that is, whether the city council of Rock Island, under its charter, had the power to pass the ordinance establishing the city *abattoir*, and appropriate the revenues of the city for its erection and maintenance; and this is the only question which it will be necessary to consider.

Under chapter 24, article 5, of our Revised Statutes of 1874, ninety-six separate and distinct powers have been conferred on the city council in cities, and upon the president and board of trustees in villages. The powers relate to the various wants and necessities which the legislature no doubt supposed should be conferred upon such incorporations to enable them to preserve order, prevent violations of law, make due and proper

regulations to secure the health of the inhabitants, and such other things as pertain to the prosperity and welfare of such incorporated bodies. It will be observed, however, that of the powers enumerated, none, in terms, authorize the construction or maintenance of an *abattoir*, or public slaughter-house, by the legislative department of the incorporation, and we find no such express power conferred by any provision of the statute. The city of Rock Island derives its powers, whatever they may be, from the act of the legislature providing for the incorporation of cities and villages, under which it is organized. In *Cook County* v. *McCrea*, 93 Ill. 236, following the rule laid down by Dillon in his work on municipal corporations, it was held that "a municipal corporation can exercise the following powers: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." There being no provision of the general incorporation law expressly conferring on the city the power to build or maintain an *abattoir*, if the power exists, it must be implied in or incident to some of the powers expressly granted by the statute; and it may be conceded that if the implied power exists, it springs from some one of the specific health powers granted by the act of incorporation. Those powers are as follows:—

"Paragraph 12. To provide for the cleansing of the streets, alleys," etc.

"15. To regulate and prevent the depositing of ashes, offal, dirt, garbage, or any offensive matter, in any street, alley," etc.

"40. To provide for the cleansing and purification of waters, watercourses," etc.

"49. To establish markets and market-houses, and to provide for the regulation and use thereof.

"50. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same."

"53. To provide and regulate the inspection of meats, poultry, fish, butter, lard, cheese, vegetables, cotton, tobacco, flour, meal, and other provisions."

"57. To regulate the construction, repairs, and use of vaults, cisterns, areas, hydrants, pumps, sewers, and gutters."

"75. To declare what shall be a nuisance, and to abate the

same; and to impose fines upon parties who may create, continue, or suffer nuisances to exist.

"76. To appoint a board of health, and prescribe its powers and duties.

"77. To erect and establish hospitals and medical dispensaries, and control and regulate the same.

"78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

"79. To establish and regulate cemeteries, within or without the corporation, and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation."

"81. To direct the location and regulate the management and construction of packing-houses, renderies, tallow chandleries, bone factories, soap factories, and tanneries within the limits of the city or village, and within the distance of one mile without the city or village limits.

"82. To direct the location and regulate the use and construction of breweries, distilleries, livery-stables, blacksmith-shops, and foundries within the limits of the city or village; also (A 91) to tax and license them.

"83. To prohibit any offensive or unwholesome business or establishment within, or within one mile of the limits of, the corporation.

"84. To compel the owner of any grocery, cellar, soap or tallow chandlery, tannery, pig-sty, privy, ... or other unwholesome . . . . house or place, to cleanse, abate, or remove the same, and to regulate the location thereof."

From an examination of these different provisions of the statute, can it, with reason, be said that the power to erect or maintain an *abattoir* can be implied in or incident to any one of them? We have not, after a careful consideration of the subject, been able to arrive at a conclusion of that character. Surely, there is nothing in the language of either of the powers granted that would lead to the conclusion that the erection of a public slaughter-house by the city was within the contemplation of the legislature in the enactment of these provisions.

But it is claimed that the city has the right to erect and maintain the *abattoir* under paragraph 53 of article 5 of the incorporation act, which declares that the city shall have the power to provide for and regulate the inspection of meats, poultry, fish, butter, lard, cheese, cotton, tobacco, flour, meal,

and other provisions. Under this clause, the city of Rock Island had the undoubted power to make reasonable provision for the inspection of meats which may be offered for sale in the city, but an inspection of the ordinance will demonstrate that it is not one of that character. When the different provisions of the ordinance are considered, it is apparent that its true object and scope is to provide a place where all animals shall be slaughtered within the city, under the management, direction, and control of the city. In other words, the ordinance provides for the erection and maintenance of a public slaughter-house within the city by an officer of the city. Section 6 of the ordinance provides that the *abattoir* shall be open for use for the inspection and slaughter of animals each day during the year during specified hours. Section 9 requires all cattle, hogs, sheep, and calves, the flesh of which shall be desired to be sold by any person licensed to sell fresh meats within the city, shall be inspected by the commissioner of health, at the city *abattoir*, or at any licensed packing-house in the city, before such animals are slaughtered. The different provisions of the ordinance, as well as the answer of the city, show, beyond question, that the purpose of the city was not to provide a place for the inspection of meats. It would be placing too narrow a construction on the ordinance in question, and one, too, not authorized by its terms, to hold that it was designed to make provision for an inspection of meats.

But it is said the city has the power under paragraph 78, which authorizes it "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," as a sanitary measure. It will, however, be observed that the incorporation act contains special enumerated provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, as respects any offensive or unwholesome business or establishment which may be conducted or maintained in the city. As has been seen, under paragraph 81 the city council is authorized "to direct the location and regulate the management and construction of packing-houses, renderies, ... bone factories, soap factories, and tanneries within the limits of the city, and within the distance of one mile without the city limits." Under paragraph 82 power is conferred "to direct the location and regulate the use and construction of breweries, distilleries, livery-stables, ... within the limits of the city; also to tax and

license them." And under paragraph 83 power is conferred "to prohibit any offensive or unwholesome business or establishment within, or within one mile of the limits of, the corporation," and under paragraph 84 the city council may "compel the owner of any . . . . unwholesome . . . . house or place to cleanse, abate, or remove the same, and to regulate the location thereof." These are sanitary measures for the promotion of health and the suppression of disease, enacted for that purpose and no other. They provide and determine what may be done by the city council. If a slaughter-house within a city is an unwholesome business or establishment,—and it needs no argument to establish the fact that it is,—it may, by proper ordinance, be regulated,—it may be prohibited. Under such circumstances, where there are both special provisions and a general provision relating to the same subject, as is the case here, the question arises, whether the general provision shall enlarge the powers conferred by the special provisions of the statute, or shall the powers specially conferred alone be exercised.

In *State* v. *Ferguson*, 33 N. H. 427, where a question of this character was under consideration, it was said: "The express grant of the power of legislation upon a particular subject, limited, by the terms of the grant, in respect to its extent or objects and purposes, or in reference to the mode in which it is to be exercised, may be held, unless the contrary manifestly appears to be the intention of the legislature, upon a view of the entire act, to exclude all authority to legislate upon that subject beyond the prescribed limits. . . . . It must be understood that the intention in the insertion of the general clause was to remove the implication which would otherwise arise, to restrain the city from enacting by-laws upon other subjects, and thus to empower them, by virtue of the special provisions conferring express power in the specified cases, to legislate upon those subjects under the limitations prescribed, and, by virtue of the general clause, upon all other matters coming within the scope of their municipal authority."

Dillon on Municipal Corporations, 2d ed., vol. 1, sec. 250, lays down the rule as follows: "When there are both special and general provisions, the power to pass by-laws, under the special or express grant, can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws, under the general clause, does not enlarge or annul the power

conferred by the special provisions in relation to their various subject-matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority." See also *City of Cairo* v. *Bross*, 101 Ill. 475.

Under these authorities, which we regard as declaring the correct rule on the subject, we do not think that section 78, relied upon, enlarged the powers conferred by the special provisions.

We have been referred, in the argument to the slaughter-house case, so called (16 Wall. 36), as an authority sustaining the ordinance in question. From an examination of the case cited, it appears that in 1869 the legislature of the state of Louisiana passed an act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-stock Landing and Slaughter-house Company. Under the act, all animals intended to be slaughtered were required to be inspected and slaughtered at the company's slaughter-house, and all other slaughter-houses within the city were required to be closed. The validity of the act was called in question mainly on the ground that the legislature had no power to pass it; but the supreme court of the United States held that the legislature had the power, and that the power was properly exercised. But the decision has no bearing on the question involved in this record. The question here is not what power the legislature has over the subject, or what power it may exercise, but the question is, whether the legislature has conferred the power on incorporated towns and villages organized under the general incorporation act. We entertain no doubt but the legislature has ample power to authorize an incorporated town to establish and maintain an *abattoir*, if it saw proper by appropriate legislation to do so; but whether that power has been conferred, presents entirely a different question, and one upon which the case cited has no bearing. The legislature, in the exercise of its legislative powers, is unrestrained, except so far as limitations have been prescribed by the constitution of the United States or of the state, while, on the other hand, a municipality can only exercise such powers as have been delegated to it by the legislature.

City of Milwaukee v. *Gross*, 21 Wis. 243, 91 Am. Dec. 472, is also relied upon as an authority to sustain the ordinance of the city. The ordinance in the case cited authorized the

controller of the city to procure from the owner of a certain slaughter-house in the city the right of all city butchers to use the slaughter-house free of charge, and all persons were prohibited from slaughtering animals at any other place within the city. The question arose as to the power of the city to pass the ordinance, and it was held that the city had the power. But upon an examination of the case it will be found that the statute under which the city acted was much broader than our statute. One clause of the act conferred the power "to direct the location and management of slaughter-houses and markets." Under this and other provisions it was said: "These provisions of the charter give the common council ample authority to establish city slaughter-houses, and regulate the management thereof." There is such a distinction between the power conferred in the case cited and our general incorporation act, that we do not regard the case as an authority. Besides, the ordinance passed in the case cited is very different from the ordinance involved here.

Under paragraphs 83 and 84 of our incorporation act, heretofore cited, we think power is conferred upon incorporated towns to prohibit slaughter-houses or any unwholesome business or establishment within the incorporation; and the common council of the town, by appropriate ordinance, may regulate the location of any unwholesome business, and may cleanse, abate, or remove the same. But such power does not authorize the passage of an ordinance like the one in question.

The judgment of the appellate court will be reversed, and that of the circuit court affirmed.

MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS as are expressly granted to them and such incidental powers as are necessary to carry into effect those specially granted, and all such powers are strictly construed: Note to *McCord* v. *Pike*, 2 Am. St. Rep. 92; *Chicago Gas L. Co.* v. *People's Gas L. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Port of Mobile* v. *Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *Anderson* v. *City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; *Agnew* v. *Brall*, 124 Ill. 312. So a city can impose no taxes except such as are authorized by their charters: *Board of Commissioners of Winston* v. *Taylor*, 99 N. C. 210; *Green* v. *Ward*, 82 Va. 324; and when the legislature confers taxing power upon a city, it must observe the restrictions and limitations of the organic law, for it cannot confer upon the city greater power than the state itself possesses: *Lancaster* v. *Clayton*, 86 Ky. 373.

But a city may be given power by the legislature under the municipal charter to do many things which the state itself has power to do, such as power to regulate the use of its streets: *St. Louis* v. *Bell Tel. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; to construct and establish drains and sewers;

Drexel v. *Lake*, 127 Ill. 54; *Beers* v. *Dalles City*, 16 Or. 334; to borrow money and issue bonds: *Culbertson* v. *Fulton*, 127 Ill. 30; to rent city buildings for entertainments: *Bell* v. *Platteville*, 71 Wis. 139; *Stone* v. *Oconomowoc*, 71 Id. 155; to control the public schools in the city: *Werner* v. *Galveston*, 72 Tex. 22; or to regulate slaughter-houses within the city limits: *St. Paul* v. *Luley*, 38 Minn. 176. Compare note to *Robinson* v. *Mayor of Franklin*, 34 Am. Dec. 632, 633.

AS TO GENERAL LIMITATIONS ON THE POWER OF MUNICIPAL CORPORATIONS to pass ordinances: Extended note to *Robinson* v. *Mayor of Franklin*, 34 Am. Dec. 627 et seq.

FOR INSTANCES OF MUNICIPAL ORDINANCES held to have been unreasonable and invalid: Note to *Ward* v. *Mayor etc. of Greeneville*, 35 Am. Rep. 702, 703. Compare *Hughes* v. *Recorder's Court etc. of Detroit*, 75 Mich. 574; 13 Am. St. Rep. 475, and note.

GOULD *v.* STERNBURG.

[128 ILLINOIS, 510.]

JUDGMENTS — EFFECT OF REVERSAL. — When property of a defendant has been sold under a judgment, afterwards reversed, to a party to the judgment, the defendant may recover it back, or if purchased by a third party, he may recover from plaintiff the value thereof; but the title is unaffected by the reversal. Only defendant or his privies can take advantage of the reversal, and this right may be waived, or if nothing is lost by the judgment, nothing can be gained by its reversal.

JUDGMENTS. — SALE ON EXECUTION UNDER JUDGMENT AFTERWARDS REVERSED is not void, but voidable only, at the election of the owner of the property sold; and if the property of a third person is sold, the judgment defendant can take no advantage of the reversal.

JUDGMENT, HOWEVER ERRONEOUS, IS BINDING upon the parties until vacated and reversed, and when affirmed by the supreme court, is regarded as free from error.

JUDGMENTS — RES JUDICATA. — A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them. It is *res judicata*, and cannot be collaterally attacked, even upon facts not brought out in the suit in which it was reudered.

JUDGMENT OR DECREE BINDING UPON THE PARTIES as the facts existed when it was rendered is not rendered less binding because subsequent events have changed those facts.

JUDGMENTS — EFFECT OF REVERSAL. — A judgment confirming title to land sold under execution is conclusive and binding on the parties and privies, though the judgment on which the execution was based is afterwards reversed.

Haley and O'Donnell, for the plaintiffs in error.

R. E. Barber and B. M. Munn, for the defendant in error.

WILKIN, J. To maintain the issue on her part, plaintiff below proved a common source of title in Hiram Gould. She

then introduced in evidence, without objection, a sheriff's deed for the premises in question, dated September 23, 1881, reciting that at the January term, 1868, of the Will circuit court, as administratrix of her deceased husband, Phillip A. Sternburg, she obtained a judgment against said Hiram Gould for $322.40, upon which, by execution and sale, said deed was executed and delivered to her; also a bill in chancery in the same court, by her as complainant, against Hiram Gould, Elizabeth Gould, Delancy Jackson, and James Gould, in which, among other things, it is alleged that, on the eleventh day of November, 1856, one Richardson and Hiram Gould made and delivered to Phillip A. Sternburg, since deceased, a promissory note for two hundred dollars, due in three years, with interest; that said Phillip, prior to his death, had brought suit upon said note, and that afterward, January, 1868, she, as his administratrix, recovered the judgment, and obtained the deed above mentioned; that at the time of making said note, said Hiram Gould owned the land described in said sheriff's deed, in fee, unencumbered, and continued to own the same up to and at the time of said sale, but in November, 1859, for the purpose of preventing the collection of said note, and without any consideration, he, with his wife, Elizabeth, conveyed the same to said Jackson, and that afterwards said Jackson and wife, without consideration, reconveyed the same to said Hiram Gould, but that said Hiram secretly held said deed for several years, and on May 1, 1880, placed it on record, with the name "Hiram" erased, and the name "James" inserted, thereby making the conveyance to James Gould instead of Hiram Gould, which change is alleged to have been a forgery, made for the purpose of cheating and defrauding creditors of said Hiram. She also introduced in evidence the answer of Hiram Gould, in which he avers that the conveyance made by him to Delancy Jackson was in good faith, for a valuable consideration, and that said Jackson took possession under the same, and afterwards conveyed to James Gould. The answer denies, generally, all the allegations of said bill. The answer of James Gould was also introduced, which is a general denial of the bill. The prayer of the bill was, that said conveyances should be set aside as against the complainant therein, and that she be put in possession of said premises.

The decree, after finding the facts substantially as alleged in the bill, decrees that the deed from said Hiram and wife to Jackson be held void, and a cloud upon complainant's title,

and orders that "the title to the premises described in said sheriff's deed be declared vested in her [the complainant] under said sheriff's deed, and she is entitled to the possession of the same against defendants and any person holding under them, and that a writ of possession issue."

This cause was submitted at the September term, 1873, and taken under advisement, with a stipulation that the decree should be rendered as of that term. The case was decided March 4, 1874. On appeal to this court the decree was affirmed, September 19, 1876.

Hiram Gould, on behalf of plaintiffs in error, testified that Charles Gould, the father of part of plaintiffs in error, and George Gould, had been in possession of said premises since 1877. There was also offered in evidence on their behalf certain deeds from James Gould and wife to said George Gould and Charles Gould, but neither of them described the land in controversy in this suit. They proved, over the objection of defendant in error, that the judgment of January, 1868, in favor of defendant in error, against Hiram Gould, was, by an order of this court, made on the 30th of January, 1874, reversed (see *Gould* v. *Sternburg*, 69 Ill. 531), and it is upon this last evidence that the decision must turn, it being insisted by plaintiffs in error that the effect of such reversal was to annul and wipe out the legal effect of all that had been done under and in pursuance of that judgment.

It is well settled in this state, that when property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof, but the title to the property, in that case, is unaffected by the reversal. No one but the defendant or his assignees can take any advantage of such reversal, and there can be no question but that he may waive that right, or, if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal. A sale on execution, based on a judgment afterward reversed, is not, therefore, we conclude, absolutely void, but voidable only, at the election of the owner of the property sold.

The question at issue in the chancery cause between defendant in error and Hiram Gould and others was, whether or not she should have the title to this land, and the decree was in her favor. However erroneous that decree might have been, it was binding upon the parties until vacated or reversed; but

having been affirmed by this court, it is to be regarded as free from all errors. A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them: Freeman on Judgments, sec. 249. The decree vesting title in defendant in error is *res judicata* as to Hiram Gould and James Gould and their privies, and cannot be questioned in this suit.

But it is insisted, on the part of plaintiffs in error, that inasmuch as the judgment upon which that decree was based was not reversed until after the decree was rendered, and the court rendering that decree had no jurisdiction to pass upon the validity of that judgment, therefore said decree may be thus collaterally attacked; in other words, while that decree would be binding upon the parties as the facts existed when it was rendered, yet subsequent events have so changed those facts as to destroy the binding effect thereof. If it be conceded, in the broadest terms, that Hiram Gould could not avail himself of the reversal in the chancery proceeding, it does not follow that he may do so now. Many, perhaps a majority, of cases in which the doctrine of *res judicata* is enforced, are cases in which facts have arisen or been discovered after the adjudication, which, if they had existed or been known at the former trial, might have changed the result. It is not true, however, in this case, that the reversal might not have been set up in the chancery proceeding. Although the cause was submitted before the order of reversal by this court was made, it had not yet been decided, and there can be no question that if proper notice had been given and an application made to the chancellor for a rehearing at the next term of court, it would have been granted, if made by a party entitled to the benefit of the reversal. He might also have filed his bill, in the nature of a bill of review, upon newly discovered matter, and thus obtained relief: Story's Eq. Pl., sec. 413; *Boyden* v. *Reed*, 55 Ill. 458. We think it is clear that he could not lie by, after obtaining his reversal, and permit the decree to become final in the circuit court and affirmed in this court, making no effort in that proceeding to reap its benefits, and now, for the first time, set it up to defeat the title therein decreed.

It is equally clear that under the proof here made neither of plaintiffs in error is in a position to take any advantage of the reversal of that judgment. Hiram Gould, the defendant, might recover from defendant in error whatever property he

lost by reason of the erroneous judgment. What has he lost? By his answer in the chancery proceeding, and by all the evidence in that case, as between himself and James Gould, the property of the latter was sold in satisfaction of that judgment.

It is true, the court held that as between defendant in error and James Gould it should be treated as the property of Hiram; but it is too well understood to require the citation of authorities that in all such cases the conveyance, though void as to creditors, is valid and binding between the parties. Whether or not James Gould could set up the reversal of said judgment as against defendant in error, is not material. Neither he nor those shown to be in privity with him are seeking to do so.

The judgment of the circuit court will be affirmed.

JUDGMENTS, CONCLUSIVENESS OF. — *Who are Concluded.* — A judgment is binding only upon the parties thereto and their privies: *Maloney* v. *Finne*, 40 Minn. 281; *Dwyer* v. *Rippetoe*, 72 Tex. 520; *San Francisco* v. *Itsell*, 80 Cal. 57; *Everling* v. *Holcomb*, 74 Iowa, 723; *Hawley* v. *Dawson*, 16 Or. 344; *Woods* v. *Montevallo etc. Co.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Dewey* v. *St. Albans Trust Co.*, 60 Vt. 1; 6 Am. St. Rep. 84; *Showers* v. *Wadsworth*, 81 Cal. 270; *Kent* v. *Kent*, 82 Va. 205; for no person can be prejudiced, or his rights of person or property affected, without notice, actual or constructive, under due process of law: *Great West M. Co.* v. *Woodmas etc. M. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and cases cited in note; so that mortgagees, who are strangers to a decree of foreclosure, are not concluded by the recitals in the record thereof: *Harper* v. *East Side Syndicate*, 40 Minn. 381.

As to What Matters Conclusive. — A question once judicially determined cannot be raised again between the same parties in a different form: *Warden* v. *McKinnon*, 99 N. C. 251. A judgment is conclusive, not only as to every matter which was offered and received to procure the judgment, but also as to any matter which might have been offered for that purpose: *Bazille* v. *Murray*, 40 Minn. 48; *Griffin* v. *Hodshire*, 119 Ind. 236; *Athens Foundry and Machine Works* v. *Bain*, 77 Ga. 72; *Denver etc. Co.* v. *Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234, and note. A prior decision by the appellate court upon a point distinctly raised is more than authority in the same case, being a final adjudication from which the court itself cannot depart, and which no inferior court can disturb, no matter how unjust the ruling of the appellate court may be: *Chicago etc. R. R. Co.* v. *Hull*, 24 Neb. 740; *Dobson* v. *Simonton*, 100 N. C. 56.

Res Adjudicata, Instances of: See note to *Hawk* v. *Evans*, 14 Am. St. Rep. 250-252. Judgment rendered upon a note is conclusive of the fact that such note had not been paid, which fact may come in issue in a subsequent action: *Dwyer* v. *Rippetoe*, 72 Tex. 520. A decree in an interpleader suit in favor of one of the adverse claimants of rent money in the hands of complainant is conclusive in a subsequent action between the same parties for the real estate from which the rents accrued, where each party asserts the same title formerly asserted by him: *Hall* v. *Cayerton*, 87 Ala. 286. So where one judge passes upon exceptions taken to a referee's report, his rulings become *res judicata*, and the same exceptions cannot be passed upon by another judge of the same court: *Scroggs* v. *Stevenson*, 100 N. C. 354; *Kent* v. *Kent*, 82 Va.

205. An adjudication that certain conveyances were not given merely to secure certain debts, and were in reality more than equitable mortgages, is conclusive in a subsequent litigation in which one of the same parties attempts to establish that such conveyances were mortgages: *Corliss* v. *Conable*, 74 Iowa, 59.

Pleading Res Judicata. — In equity, the defense of *res judicata* must be specifically pleaded in bar, or set up in answer: *Turley* v. *Turley*, 85 Tenn. 251; and it is too late to make such defense upon appeal of the case: *Sharon* v. *Sharon*, 79 Cal. 636.

Conclusiveness of Judgments upon Collateral Attack. — Judgments cannot be impeached by collaterally attacking them for errors and irregularities which do not render them absolutely void: Cases collected in note to *Furgeson* v. *Jones*, 11 Am. St. Rep. 821; even though such judgments are erroneous in all their parts: *Derr* v. *Wilson*, 84 Ky. 14. For recitals in records of judgments are conclusive until reversed upon appeal, or set aside in a direct proceeding: *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note; *Goodwin* v. *Sims*, 86 Ala. 102; 11 Am. St. Rep. 21; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *Gage* v. *Stokes*, 125 Ill. 40; *Robinson* v. *Fries*, 22 Fla. 303; *Peck* v. *McLean*, 36 Minn. 228; 1 Am. St. Rep. 665.

Conclusiveness of Judgments in Appellate Courts — The Law of the Case. — Where a ruling has been made by the appellate court, it becomes the law of the case, and cannot be reviewed at a subsequent term: *Doyle* v. *Wade*, 23 Fla. 90; 11 Am. St. Rep. 334; *Dobson* v. *Simonton*, 100 N. C. 56; *Chicago etc. R. R. Co.* v. *Hull*, 24 Neb. 740; *Heffner* v. *Brownwell*, 75 Iowa, 341; *Adams County* v. *Burlington R'y Co.*, 55 Id. 94; *Applegate* v. *Dowell*, 17 Or. 299; *Budd* v. *Multnomah St. R'y Co.*, 15 Id. 404; *Thompson* v. *Hawley*, 16 Id. 251; *Learned* v. *Castle*, 78 Cal. 454; *Stuart* v. *Preston*, 80 Va. 625; *Alexandria Savings Bank* v. *McVeigh*, 84 Id. 41; *Mahan* v. *Wood*, 78 Cal. 253; *McKinney* v. *State*, 117 Ind. 26; *Hannon* v. *Grizzard*, 99 N. C. 161; *Mason* v. *Burk*, 120 Ind. 404; but this rule does not apply to mere *dicta* contained in appellate decisions: *Bates* v. *Taylor*, 87 Tenn. 319; *Gwinn* v. *Hamilton*, 75 Cal. 265; although it does apply to all points plainly decided, whether such points were essential to the disposition of the case or not: Id. Still the doctrine that the appellate court will stand by its former decisions, whether erroneous or not, in all subsequent appeals of the same case, is not favorable to the idea of the supreme court of California, and will be applied only to such cases where it has already been held to apply; and it will never be held that erroneous *dicta* are the law of the case, even upon a subsequent appeal of the same case; nor can erroneous decisions in one case be applied as precedents in other cases: *Wixson* v. *Devine*, 80 Cal. 386. Former decisions of an appellate court may or may not be applicable to similar cases under a subsequent statute, depending entirely upon the respective similarity in the provisions of the statutes: *Kellogg* v. *Howes*, 81 Id. 170. Decisions of the majority of the appellate court in bank control as to the same questions subsequently arising in department: *Arnold* v. *San José*, 81 Id. 619. The general rule is, that when a case has once been decided upon appeal, and again comes before the court by appeal, only such questions can come up for consideration as were not determined upon the former appeal: *Keith* v. *Keith*, 97 Mo. 223; *Burton* v. *Burton*, 79 Cal. 490; or such proceedings as arose in a new trial of the case in the court below subsequent to the remanding order of the appellate court: *Fortenberry* v. *Frazier*, 5 Ark. 200; 39 Am. Dec. 373. But a dismissal of an appeal because prematurely taken will not bar a second appeal in the same case: *Rose's Estate*, 80 Cal. 166. The rule as to the law of the

case applies to adjudications of interlocutory orders affirmed or reversed upon appeal: *Dobson* v. *Simonton*, 100 N. C. 56.

And judgments of the supreme court, after the term at which they were rendered has elapsed, are absolutely final and conclusive: *Rawdon* v. *Rapley*, 14 Ark. 203; 58 Am. Dec. 370; and the cause can never be reopened at a subsequent term of court for a rehearing: *Ashley* v. *Hyde*, 6 Ark. 92; 42 Am. Dec. 685, and cases in note.

REVERSAL OF JUDGMENTS, THE EFFECT OF. — The reversal of a judgment restores the parties to their original rights, so far as this can be done without prejudice to third persons: *McJilton* v. *Love*, 13 Ill. 486; 54 Am. Dec. 449, and note; but the defendant, after the reversal of an erroneous judgment against him, is entitled to restitution of only so much as the plaintiff has received upon the execution levied thereunder: *Peck* v. *McLean*, 36 Minn. 228; 1 Am. St. Rep. 665, and note; compare extended note to *Little* v. *Bunce*, 28 Am. Dec. 368–372, upon the subject of restitution of property upon a reversal of judgment. See also *Kaufman* v. *Dickensheets*, 30 Ind. 258; 95 Am. Dec. 694. Reversals do not affect the rights of *bona fide* purchasers under decrees and judgments, when such rights were acquired before proceedings to reverse were instituted: *McCormick* v. *McClure*, 6 Blackf. 466; 39 Am. Dec. 441; *Reynolds* v. *Harris*, 14 Cal. 667; 76 Am. Dec. 459, and note. The rule that the reversal of a judgment for the sale of land does not divest the title of a purchaser under the decree, even though such purchaser is the plaintiff, does not apply, where the land ordered to be sold was the property of another than the defendant, and the indebtedness for which it was sold has been finally decided not to exist: *Baker* v. *Baker*, 87 Ky. 461.

CHICAGO WEST DIVISION R'Y CO. *v.* BECKER.

[128 ILLINOIS, 545.]

EVIDENCE — DECLARATIONS AS RES GESTÆ. — Declarations of a boy as to how he received an injury, given in response to the question of "what was the matter," after he had been injured by a street-car, and had got up and walked to the sidewalk and sat down, are inadmissible as part of the *res gestæ*.

EVIDENCE — DECLARATIONS AS RES GESTÆ. — Declarations not made at the time of the accident, which do not explain nor characterize the manner in which the accident occurred, are not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as part of the principal transaction, are not admissible as part of the *res gestæ*.

EVIDENCE — DECLARATIONS AS RES GESTÆ. — When the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, it is admissible as part of the *res gestæ;* but when it is merely a history, or part of a history, of a completed past affair, it is inadmissible.

W. B. Keep, Edmund Furthmann, and H. H. Martin, for the appellant.

Campbell and Custer, for the appellee.

MAGRUDER, J. This is an action on the case, brought in the superior court of Cook County by the appellee, as administrator, to recover damages for the death of his son Henry J. Becker, a boy between eight and nine years of age, against the appellant company, which operates a street-railway on Blue Island Avenue, in the West division of the city of Chicago. Verdict and judgment in the trial court were in favor of the plaintiff. The case is brought here by appeal from the appellate court, which affirmed the judgment of the superior court.

The boy died on November 29, 1885. The injuries which caused his death were received about eight o'clock in the evening of November 28, 1885, on Blue Island Avenue near its intersection with Henry Street, and were caused by one of appellant's street-cars, going southward on Blue Island Avenue. It is charged in the declaration that the conductor of the car pushed the deceased from the front platform, and that the car ran over him.

No witness was produced on either side who saw the accident, or could testify to the manner in which it occurred. The only testimony in support of the theory that the boy was pushed or thrown from the car is that of two witnesses, who swear to the declarations made by the boy himself after he was hurt. Two lads named Custy and Burke, the oldest of whom was seventeen years old, were passing along Henry Street across Blue Island Avenue when they saw the boy, and noticed that he was injured. Custy says: "I saw the boy on the street; he was on his feet and walked towards the sidewalk; I went to him and asked him what was the matter; he said the conductor took him by the arm and shook him off the car." Burke says: "We were going up on Blue Island Avenue, and we saw a little fellow getting up; we ran over to him and asked him what was the matter, and he says the conductor caught him by the arm and threw him off the car." The car had passed on "about a lot south of Henry Street," and was going "at a good speed."

Blue Island Avenue is eighty feet wide. The boy rose from the ground in the middle of the street, and walked to the sidewalk on the east side of the street, and sat down. The evidence of Custy tends to show that the deceased made the statement about his being thrown from the car while he was on his way to the sidewalk. The evidence of Burke, however, is quite positive to the effect that the statement was made

after the sidewalk was reached. The testimony of Magdalene Elbe tends to confirm what Burke says upon this subject.

The proof as to the declarations of the deceased was admitted by the trial court over the objection of the defendant below. The ruling was excepted to. When the plaintiff rested, the defendant moved to exclude the testimony from the jury, and filed its motion in writing. The motion was overruled, and exception was taken.

We think that the admission of proof as to what was said by the deceased, under the circumstances thus detailed, was erroneous. The declarations were not a part of the *res gestæ*. They were not made at the time of the accident, nor did they explain or characterize the manner in which the accident occurred. They were not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as a part of the principal transaction. They were made after the injury was received, and were merely narrative of what had taken place. They were spoken by the deceased as his answer when he was asked "what was the matter." The true inquiry, according to all the authorities, is, whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent, in the other it is not: *Mayes* v. *State*, 64 Miss. 329; 60 Am. Rep. 58; *Waldele* v. *New York etc. R. R. Co.*, 95 N. Y. 274; 47 Am. Rep. 41; *Lander* v. *People*, 104 Ill. 248.

For the error in admitting testimony as to the declarations made by plaintiff's intestate, the judgments of the appellate and superior court are reversed, and the cause is remanded to the superior court.

EVIDENCE — RES GESTÆ — DECLARATIONS. — As to what declarations are admissible in evidence as part of the *res gestæ: Dundas* v. *City of Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and cases cited in note.

SERCOMB *v.* CATLIN.

[128 ILLINOIS, 556.]

RECEIVERS. — POWERS OF RECEIVERS APPOINTED IN ONE STATE are only co-extensive with the jurisdiction of the court appointing them, but they may be permitted, by comity, to recover possession of property in another state, if no citizen nor suitor of that state is thereby prejudiced or injured.

RECEIVERS — CONTEMPT IN INTERFERING WITH RECEIVER'S POSSESSION. — Though a receiver may not have reduced the funds of the insolvent to his possession, and though part of them may be in another state, still the title to all of them and the constructive possession of them is in him by virtue of his appointment; and a citizen within the jurisdiction of the court appointing him cannot attach the funds in the other state without the sanction of that court, and by so doing, and refusing to dismiss his suit, he is guilty of and may be punished for contempt.

CORPORATIONS CAN ONLY BE PUNISHED FOR CONTEMPT through their officers, or those acting in aid of such corporations.

CONTEMPT. — AGENT OR MANAGER OF FOREIGN CORPORATION within the jurisdiction, and who commits a contempt of court, may be punished therefor, without making the corporation *eo nomine* a party to the proceeding, although it was named as plaintiff in the action constituting the contempt.

Flower, Remy, and Holstein, for the appellant.

Kraus, Mayer, and Stein, for the appellee.

MAGRUDER, J. This is an appeal from a judgment of the appellate court of the first district, affirming an order of the superior court of Cook County for the arrest and imprisonment of the appellant on account of his alleged contempt of court. On April 14, 1887, in the case of *Havens* v. *Clapp*, then pending in said superior court, the appellee was appointed receiver of all the property and effects, real and personal, of the defendants therein, Caleb Clapp and Thomas Davies. Prior to that date, Clapp and Davies had forwarded, on consignment, to Elijah E. Newton, an auctioneer and commission merchant in Washington City, in the District of Columbia, a lot of jewelry, watches, and silverware, to be by him disposed of for their benefit. So far as appears to the contrary, the goods so consigned were still in the possession of Newton, at Washington, when the order was entered on April 7, 1888, for the commitment of appellant for contempt.

Within a week or ten days after his appointment as receiver, appellee gave notice of such appointment to Newton, and demanded a return of the goods. On May 18, 1887, the Meriden Britannia Company, a corporation organized under the laws of the state of Connecticut, being a creditor of Clapp and Davies, commenced an attachment suit against them for the

amount of its claim in the supreme court of the District of Columbia, and attached the goods in the hands of Newton.

When appellee was appointed receiver, and for a long time prior thereto, the Meriden Britannia Company did business in the city of Chicago, and had a branch office there. The business manager of the company in Chicago was then and is now the appellant, Sercomb. The appellant began the attachment suit in Washington on behalf of the company, making the affidavit necessary to procure the attachment, and caused the property in the possession of Newton to be attached. The affidavit so made by him was sworn to before a notary public in Chicago. Appellant had full knowledge of appellee's appointment as receiver before the attachment suit was commenced.

On May 31, 1887, appellee, as receiver, filed his petition in the case of *Havens* v. *Clapp*, setting up substantially the foregoing facts, and claiming to be the owner of the goods in Washington, and praying for an order upon Sercomb, as manager of said company, to show cause why he should not be attached for contempt in prosecuting the attachment suit, and thereby interfering with property belonging to an officer of the court. Appellant appeared and filed a general demurrer to the petition. The demurrer being overruled, he elected to stand by it. Thereupon, on June 15, 1887, an order was entered, requiring him to furnish proof to the court on June 24, 1887, of having dismissed the attachment suit, and, in default of so doing, that he show cause by ten o'clock on June 25, 1887, why he should not be attached for contempt. The case was then taken to the appellate court by writ of error, and the writ was there dismissed, because the order of June 15, 1887, was not a final order. After due notice, a copy of such judgment of dismissal was filed in the superior court, and the proceeding was there reinstated.

Appellee again filed his petition in the superior court on April 5, 1888, setting up the previous proceedings as above detailed, charging the failure of Sercomb to obey the order of June 15, 1887, and praying that he show cause by April 7, 1888, why he should not be punished for contempt, etc. To this petition, also, appellant demurred, and stood by his demurrer upon its being overruled. Thereupon the final order of April 7, 1888, heretofore referred to, was entered.

Under the facts thus stated, did the commencement and prosecution of the attachment suit by Sercomb, as manager

of the Meriden Britannia Company, and his refusal to dismiss it as he was required to do by the order of the superior court, amount to a contempt of court?

If Sercomb himself had owned the claim sued upon in the attachment suit, and had begun that suit in Illinois, he would have been guilty of contempt, upon the authority of the case of *Richards* v. *People*, 81 Ill. 551. There, in a suit against a railway company, the circuit court of De Witt County appointed one Wright receiver of the real and personal property and choses in action of the company. Richards, knowing of such appointment, recovered judgments against the company before a justice of the peace in Champaign County, and garnished certain persons who held funds belonging to the company. He continued the prosecution of the suits after being informed of an injunction, issued against such prosecution, and directed to his attorney, but not to himself. He claimed that he was not guilty of contempt, because the funds in question had not been taken possession of by the receiver; but this claim was not sustained, and his conduct in the prosecution of the garnishee proceedings was held to be a contempt of court. Although the funds had not been reduced to possession by the receiver, the title thereto had vested in him by virtue of his appointment, and such funds could not be seized or attached by creditors of the original debtor with impunity. It was there said: "It is to be remembered that the receiver is the officer of the court, and that his possession is the possession of the court itself, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose without the sanction of the court appointing him, is a direct and immediate contempt of court, and punishable by attachment. . . . . It can make no difference in the application of the rule whether the property is actually or only constructively in the receiver's possession."

The case at bar differs, however, from the Richards case in that here the property attached was not in Illinois, but in the District of Columbia. It is insisted by counsel for appellant that the appellee receiver would not be permitted to go into the foreign jurisdiction to get possession of the property in Newton's hands. Undoubtedly the general rule is, that the powers of a receiver are co-extensive only with the jurisdiction of the court which appoints him: *Chicago etc. R'y Co.* v. *Packet Co.*, 108 Ill. 317. He has no extraterritorial power of official

action. But a receiver appointed in one state may, by comity, be permitted to recover the possession of property in another state, provided no citizen or suitor of the latter state is thereby prejudiced or injured: High on Receivers, sec. 47; *Hunt* v. *Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Hoyt* v. *Thompson*, 5 N. Y. 320; *Hoyt* v. *Thompson*, 19 Id. 297. If appellant had not caused the attachment suit to be brought against the goods in Newton's hands, it does not appear that appellee would not have been allowed to enforce his rights against those goods in the District of Columbia. It is not shown that such action on his part would have injured any citizen or suitor in the District. Newton himself may have eventually surrendered the property to appellee without suit.

It is also said that if the appellee should intervene in the attachment suit in the District of Columbia, and set up his claim to the property by virtue of his appointment as receiver, he could not prevail in that suit as against the Meriden Britannia Company, the attaching creditor, upon the general ground that any statutory or judicial proceeding in one state, by which trustees, assignees, or receivers are appointed to take possession of the property of insolvent debtors *in invitos*, will not be enforced in another state, and that the property taken under such proceeding is subject to the equities of foreign creditors: *Rhawn* v. *Pearce*, 110 Ill. 350; 51 Am. Rep. 691. This doctrine has no bearing upon the question involved in the present controversy. The question is not whether appellee, by intervening in the foreign suit, could be successful therein against the attaching creditor. The question is, whether appellant has been guilty of interfering with an officer of the court by causing the attachment suit to be commenced. It is true that the property attached is beyond the jurisdiction of the courts of this state, but the appellant, who caused it to be attached, is in this state, and within the jurisdiction of its courts. If the superior court had no power to reach the goods in Newton's hands, it had the power to reach appellant, who sought to prevent its receiver from getting possession of the goods. It makes no difference that the property was in a foreign jurisdiction.

In the Richards case, Richards brought suit in Illinois to get hold of a fund in Illinois belonging to Wright, receiver, and his act was contempt of court, because it interfered with the receiver, and prevented him from reaching such fund. Appellant brings suit in the District of Columbia to get hold of

property there belonging to the appellee receiver. His act is just as much an interference with the receiver as though the property was in Illinois. If the attaching creditor can succeed in the foreign suit as against appellee, then the effect of the suit is to take the property from the appellee. If appellee, by intervening in such suit, should defeat the attaching creditor, he will have been forced by the appellant to make a contest for what he may have obtained without a contest. In either case the officer of the court is interfered with in the discharge of his trust.

"Where a court of equity has jurisdiction over the person of a defendant, it is familiar learning that it may make decrees and orders affecting his property which is situated outside of its jurisdiction": Beach on Receivers, sec. 243. In *Langford* v. *Langford*, 5 L. J., N. S., Ch. 60, which was an equity proceeding in England, where a receiver had been appointed over an estate in Ireland, and where the tenants on the estate had been notified to pay the rents to the receiver, Lord Langford, the defendant in the cause, attempted to collect the rents himself, on the ground that the order appointing the receiver was of no force and effect in Ireland; and his course in this regard was held to be contempt of court. It was there said that the English court had not the means of sending its officers to carry into effect its orders in Ireland, but it had jurisdiction over all persons in England, and could compel obedience to its orders.

In *Chaffee* v. *Quidnick Co.*, 13 R. I. 442, a court of equity in Rhode Island, in a proceeding there pending, appointed one Farnsworth receiver of the property of the Quidnick Company, and directed him to collect certain moneys belonging to the company in the hands of Harding, Colby, & Co. in New York. Certain attorneys, who had acted as counsel for the defendants in this proceeding, and had assisted in framing the order appointing the receiver, had a claim against the Quidnick Company for fees. One of them was a resident of Massachusetts and one of New York. In order to collect their fees, they began suit against the company in a court in New York, and attached the funds in the hands of Harding, Colby, & Co. The Rhode Island court, upon being informed of the facts, through a petition filed by the receiver, held that the attorneys had obstructed and interfered with the receiver by bringing the suit in New York, and were guilty of contempt, notwithstanding the fact that the attached funds were out-

side the jurisdiction of the Rhode Island court. See also *Dehon* v. *Foster*, 4 Allen, 545; *Vermont R. R.* v. *Vermont R. R.*, 46 Vt. 792.

In the case at bar, the appellant was not a party to the original suit, in which appellee was appointed receiver, and did not occupy any such relation to that suit as was sustained by Lord Langford in the English case, and by the attorneys in the Rhode Island case, to the suits in which they were respectively adjudged to be guilty of contempt. But the position of appellant here is exactly the same as was that of Richards in the case of *Richards* v. *People*, *supra*. Richards was not a party to the original proceeding in which Wright was appointed receiver. It only appears that he was within the jurisdiction of the Illinois court. The injunction was not issued until the receiver had reported to the court that the garnishee proceedings had been instituted.

It is said that the appellant should not be held to be guilty of contempt for refusing to dismiss a suit, in which he himself was not the plaintiff, but in which the Meriden Britannia Company was plaintiff. It is true that the latter company is a Connecticut corporation. But when the attachment suit was begun, the company could be brought into court, under our statute, by service upon appellant as its business manager and agent. Through the presence of its agent here, it was subject to the jurisdiction of the Illinois courts, so far as suits, or proceedings for contempt, against it are concerned. A corporation can only be punished for contempt through its officers, or those acting in aid of it: *First Congregational Church etc.* v. *City of Muscatine*, 2 Iowa, 69; Rapalje on Contempts, secs. 1, 48. We think that it was sufficient, under the circumstances of this case, to compel the appellant, as manager of the company, to answer to the contempt proceeding, without making the company itself, *eo nomine*, a party to such proceeding, because it is admitted by the appellant upon the face of this record that he caused the attachment suit to be instituted, that it has since been prosecuted under his order and direction, that it has always been in his power, since said suit was begun, to dismiss it, and that it has always been in his power, as the manager of said company, to cause such suit to be dismissed.

The judgment of the appellate court is affirmed.

RECEIVERS. — As to the jurisdiction of receivers appointed in one state to prosecute actions in other states: Note to *Alley* v. *Caspari* 6 [illegible] St. Rep.

185–189; *Humphreys* v. *Hopkins*, 81 Cal. 551; *ante*, p. 76, and note. The legal authority of receivers duly appointed is co-extensive only with the jurisdiction of the court by whom they were appointed: *Hunt* v. *Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592.

RECEIVERS, SUIT AGAINST. — Receivers cannot be sued elsewhere than in the same court which appointed them, without that court's permission, and it is discretionary with the court to allow or refuse such permission: *Reed* v. *Axtell*, 84 Va. 238; and it is contempt of court for third persons to attempt to deprive a receiver of possession, whether by force or by suit: *Walling* v. *Miller*, 108 N. Y. 173, and note.

CONTEMPT BY A CORPORATION. — A corporation may be punished for contempt: *Golden Gate M. Co.* v. *Superior Court*, 65 Cal. 187.

HARRIS *v.* PEOPLE.

[128 ILLINOIS, 585.]

JURY AND JURORS — RIGHT OF TRIAL BY JURY. — In prosecutions for felony, where a plea of not guilty is entered, the right to a jury trial cannot be waived, so as to confer jurisdiction to try, convict, and sentence defendant without the intervention of a jury, under constitutional and statutory provisions guaranteeing and declaring inviolable the right of trial by jury as provided for at common law.

JURY AND JURORS — RIGHT OF TRIAL BY JURY — FUNCTIONS OF COURT AND JURY. — A jury being the only legally constituted tribunal for the trial of an indictment for felony, the court is not such tribunal, and in the absence of the jury the judge has no jurisdiction to sit as a substitute for it, and perform its functions, and if he attempts to do so his acts are void.

JURY AND JURORS. — RIGHT OF TRIAL BY JURY MAY BE WAIVED by a plea of guilty, but such waiver cannot confer jurisdiction upon a tribunal which has no such jurisdiction by law.

S. B. Minshall and James Whittaker, for the plaintiff in error.

George Hunt, attorney-general, for the people.

BAILEY, J. Nancy Harris, the defendant, was indicted in the criminal court of Cook County, the indictment charging her, in the first count, with the crime of larceny, and in the second count with receiving and aiding in concealing stolen property, knowing it to be stolen, with the intention of preventing the owner from again possessing the same. In both counts the value of the property stolen was alleged to be a sum exceeding fifteen dollars. The defendant, being arraigned, pleaded not guilty, and thereupon, by agreement between the defendant, her counsel, and the state's attorney, a jury was waived, and the defendant was tried by the court without a jury. At such trial the court found her guilty as charged in the indict-

ment, and sentenced her to imprisonment in the penitentiary for the term of one year. She now brings the record to this court, and alleges that her conviction is illegal, for the reason that the criminal court had no power or authority to try her without a jury.

The question thus presented is, whether, in a prosecution for a felony, where a plea of not guilty is entered, the right to a jury trial can be waived, so as to confer upon the court the jurisdiction to try, convict, and sentence the defendant without the intervention of a jury. It must be admitted that, if the power to try an indictment for a felony without a jury exists, such power is not given by the express terms of either the constitution or statutes. Article 2 of the constitution, known as the Bill of Rights, contains the following:—

"Sec. 2. No person shall be deprived of life, liberty, or property without due process of law."

"Sec. 5. The right of trial by jury as heretofore enjoyed shall remain inviolate."

"Sec. 9. In all criminal prosecutions, the accused shall have a right to . . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Division 13 of the Criminal Code contains the following provisions:—

"Sec. 8. All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode," etc.

"Sec. 11. Juries in all criminal cases shall be the judges of the law and of the fact."

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty was a jury of twelve men: 4 Bla. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale P. C. 161; Bac. Abr., tit. Juries, A; 2 Bennett and Heard's Lead. Cas. 327. This right of trial by jury in all capital cases — and at common law a century and a half ago all felonies were capital — was justly regarded as the great safeguard of personal liberty. Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the

shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion": 4 Bla. Com. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court.

Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the constitution above cited, the common-law right to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that, in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts, as at common law, but are also the judges of the law, as provided by our statute.

But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. But while a defendant may waive his right to a jury trial, he cannot, by such waiver, confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law, and not from the consent of the parties, but in the present case jurisdiction is sought to be based, not upon any law conferring it, but upon the defendant's consent and agreement to waive a jury, and submit her cause to the court for trial. "It is a maxim in the

law that consent can never confer jurisdiction; by which is meant, that the consent of the parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and, upon considerations of general public policy, defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties": Cooley on Constitutional Limitations, 398.

It is said, however, that the constitution and statutes confer upon the criminal court of Cook County general jurisdiction of all criminal cases arising in Cook County. That is true, but the court, when properly constituted for the trial of criminal cases, and especially for the trial of felonies, consists not merely of a judge, but also of a clerk, a sheriff, a state's attorney, and a jury. For the trial of felonies, the judge alone is not the court. The judicial functions brought into exercise in such trials are parceled out between him and the jury, and so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff as to the judge.

The views we have expressed are fully supported by the authorities. Thus in *State* v. *Lockwood*, 43 Wis. 403, a defendant to a criminal information waived a jury, and submitted his cause to the court for trial, and was tried by the court, and convicted. On appeal to the supreme court, it was held that the proceeding was a mistrial, and that there had been no conviction within the meaning of the statute. In the opinion the court say: "A plea of not guilty to an information or indictment for crime, whether felony or misdemeanor, puts the accused upon the country, and can be tried by a jury only. The rule is universal as to felonies; not quite so as to misdemeanors. But the current of authority appears to apply it to both classes of crime; and this court holds that to be safer and better, alike in principle and practice. The right of trial by jury, upon information or indictment for crime, is secured by the constitution, and upon a principle of public policy, and it cannot be waived." In *Williams* v. *State*, 12 Ohio St. 622, the defendants were indicted for a felony, and having entered a plea of not guilty, they waived a jury, and consented to a trial by the court, and were tried and convicted. The conviction was reversed on writ of error, the supreme court holding that it was not in the power of the accused to waive a trial by jury, and by consent submit to have the facts found by the

court, so as to authorize a legal judgment and sentence upon such finding.

The question has most frequently arisen where a defendant to a criminal prosecution has waived a trial by a full panel, and has consented to be tried by a smaller number of jurors. In all the states where the question has arisen in that form, with a very few exceptions, it has been held that a defendant has no power to waive a trial by a full panel of twelve men, the reasoning upon which such decisions are based being equally applicable to cases where an attempt is made to dispense with a jury altogether. The doctrine of the decisions of that class is summed up by Judge Cooley as follows: "A petit jury is a body of twelve men, who are sworn to try the facts of a case, as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution guarantees to accused parties, when a less number is not allowed in express terms; and the necessity of a full panel could not be waived,—at least in case of felony,—even by consent. The infirmity in the case of a trial by a jury of less than twelve, by consent, would be, that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would, in effect, be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state": Cooley on Constitutional Limitations, 319.

In *Cancemi* v. *People*, 18 N. Y. 128, the court, while conceding that the defendant in a criminal case may, by consent, affect the conduct of the case in various particulars, lays down the rule that "the substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties"; and, "when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." Among the numerous other cases where a similar doctrine has been laid down, the following may be cited: *Work* v. *State*, 2 Ohio St. 297; 59 Am. Dec. 671; *State* v. *Mansfield*, 41 Mo. 470; *State* v. *Davis*, 66 Id. 684; 27 Am. Rep. 387; *Neales* v. *State*, 10 Mo. 499; *Brown* v. *State*, 8 Blackf. 561; *Allen* v. *State*, 54 Ind. 461; *Commonwealth* v. *Shaw*, 1 Pittsb. Rep. 492; *Hill* v. *People*, 16 Mich. 351.

In the trial of Lord Dacres for treason, in the reign of Henry VIII., the question was presented whether the prisoner might waive a trial by his peers, and be tried by the country, and all the judges of the king's bench agreed that he could not, for the statute of Magna Charta was in the negative, and the prosecution was at the instance of the king. The same was again resolved on the arraignment of Lord Dudley in the seventh year of the reign of Charles I., and the reason assigned was, that the mode of trial was not so properly a privilege of the nobility as a part of the indispensable law of the land, like the trial of commoners by commoners, enacted, or rather declared, by Magna Charta: 2 Wooddeson's Lectures, 346; see also 3 Inst. 30.

In *People* v. *Lyons*, 16 Chic. L. N. 320, the late Judge McAllister, in a case brought before him on *habeas corpus*, where the defendants had been tried and convicted of a felony by the court, a jury having been waived by their consent, delivered an able and satisfactory opinion holding that the conviction was void, and that the defendants were illegally imprisoned thereunder.

We are of the opinion, then, both upon principle and authority, that the criminal court had no legal power to try the defendant without a jury, notwithstanding her consent and agreement in that behalf, and that the trial and conviction are therefore erroneous. The judgment will be reversed, and the cause remanded.

RIGHT OF TRIAL BY JURY IN CRIMINAL CASES. — In criminal cases, the prisoner cannot waive a jury: *State* v. *Carman*, 63 Iowa, 130; 50 Am. Rep. 741; but in the case of *State* v. *Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, it was decided that a prisoner was bound by his consent given to be tried by a jury consisting of less than twelve men; and in the case of *State* v. *Worden*, 46 Conn. 349, 33 Am. Rep. 27, it was held that a statute which provided that persons charged with criminal offenses could elect to be tried by the court instead of by jury was constitutional, and that an election to be tried by the court would bind the accused.

In the case of *State* v. *Cottrill*, 31 W. Va. 162, it was held that the provision of the Bill of Rights declaring that "trial of crimes and misdemeanors, unless otherwise provided, shall be by a jury of twelve men," not only guaranteed to persons accused of crimes the right to be tried by twelve jurors, but also inhibited the trial of such issues by the court instead of a jury; and it was questioned whether, in a mere misdemeanor case, the defendant could be tried by the court, even with his own consent.

While in *State* v. *Mead*, 4 Blackf. 309, 30 Am. Dec. 661, the rule is laid down that a waiver of trial by jury in a criminal case can only be effectuated by the consent of both the accused and the prosecution.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

HARVEY *v.* MERRILL.

[150 MASSACHUSETTS, 1.]

JUDICIAL NOTICE WILL NOT BE TAKEN OF THE STATUTES OF ANOTHER STATE. Its common law will be presumed to be the same as that of this state; and whether a contract made in another state is void by its laws will be determined according to the common law of this state, in the absence of evidence that a different law prevails in the former state.

WAGERING CONTRACTS, WHAT ARE. — If, though a formal contract is made for the purchase and sale of merchandise to be delivered in the future, at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by the payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering one. If, however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have the right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver merchandise, and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

WAGERING CONTRACTS WITH BROKERS, WHAT ARE. — If one employs brokers to procure and enter into contracts for him, which are not in themselves wagering contracts, but the brokers further agree that they will procure these contracts to be set off against each other according to the usage of a board of trade, so that their principal will not be required to receive the merchandise contracted to be bought by him, nor to deliver the merchandise contracted to be sold by him, but that he shall only be

required to pay to such brokers, and only be entitled to receive from them the differences between the amount of money which the merchandise was bought and sold for, and that the principal shall furnish a certain margin, and pay certain commissions, the contract with the brokers is a wagering contract, and they cannot recover their commissions, nor any amount due them for losses sustained.

CONTRACTS WHICH ARE VOID AT COMMON LAW because they are against public policy are illegal as well as void, and money expended under them cannot be recovered.

BROKERS WHO KNOWINGLY MAKE CONTRACTS WHICH ARE VOID AND ILLEGAL AS AGAINST PUBLIC POLICY, and advance money on account of them, at the request of their principals, cannot recover either the moneys advanced nor commissions for their services.

ACTION of contract to recover for losses sustained and commissions earned by the plaintiffs as brokers for the defendants in the purchase and sale of pork on the Chicago board of trade. The auditor, to whom the case was referred, reported substantially as follows: That plaintiffs were commission merchants and brokers, dealing in provisions and corn as members of the Chicago board of trade; that the defendants were brokers in the city of Boston, and, as such, forwarded orders to the plaintiff for the purchase and sale of pork upon contracts for future delivery; that the plaintiffs entered into such contracts in their own names, but on account of the defendants, who promised to pay plaintiffs a commission for the execution of the orders, and to reimburse them for any expense or loss which should be ascertained in a final settlement. After the defendants had given the orders, and the plaintiffs had executed them, a rapid decline in the market took place, resulting in the loss of twenty thousand dollars, which the plaintiffs paid. According to the custom of such dealings for persons in the situation of plaintiffs and defendants, the former generally required a deposit of a margin, and such margin had been furnished by the defendants to the extent of one thousand dollars on May 28, 1883, and three thousand dollars on July 2d of the same year. The defense to this action was, that these contracts were made upon a mutual understanding that no delivery of merchandise was intended or expected; that by offsetting contracts of sales for future delivery, settlements were to be made by the payment of the difference in prices according to the state of the markets, and that the contracts were merely a device to enable parties to make what were in fact wagers upon a probable rise or fall in the market. It was understood by both parties that though the contracts should on their face require an express delivery of the pork

publicly sold, that these formal contracts should be set off one against the other, and the necessity of receiving or delivering pork should be at all times avoided, and that the transactions were to be adjusted merely by settling those differences which the chances of the rise and fall of the market should create. These contracts were executed in Chicago, Illinois, and governed by the laws of that state. The only statute of that state upon the subject found by the auditor was as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, shall be fined not less that ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." The contracts actually entered into did not give the parties an option to sell or buy at a future time, but were, by their terms, to be fulfilled by the delivery of pork in a future month, and were not forbidden by statute. The auditor, however, found the contracts invalid, upon the ground that "it was well understood between the parties that actual deliveries were not to be made, but were to be avoided by the device of making equivalent contracts for the sale of an equal number of barrels of pork deliverable in the same month, and then by making a direct settlement by a set-off of these opposite contracts, and by paying or receiving the difference created by the rise or fall in the market prices." By the rules of the board of trade the purchaser could exact the delivery of the article, and the seller could likewise insist upon delivery and payment, but in a vast majority of the transactions of the board, settlement was in fact made by the set-off of opposite contracts, or by paying differences. The defendants had never dealt in this article of merchandise by actual receipt and delivery thereof; they had no facilities for handling it; and while they had nominally purchased and sold large quantities of merchandise, no part of it had ever been received or delivered by them, nor any warehouse receipt or bill of lading taken. At the trial the report of the auditor was the only evidence introduced by either party, and the court thereupon instructed the jury that the plaintiffs were entitled to a verdict, and the jury found accordingly.

E. W. Hutchins and H. Wheeler, for the plaintiffs.

R. M. Morse, Jr., and W. S. Knox, for the defendants.

FIELD, J. The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. We cannot take notice of the statutes of Illinois, except so far as they are set out in the auditor's report; and the auditor has set out but one statutory provision of that state, and has found that the parties have not acted in violation of that. We are therefore to determine whether the contract between the parties, as the auditor has found it to be, is illegal and void by the common law of Massachusetts.

It is not denied that, if, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise, and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

The construction which we think should be given to the auditor's report is, that he finds that the contracts which the plaintiffs made on the board of trade with other members of that board were not shown to be wagering contracts, and that the contract which the defendants made with the plaintiffs was, that the defendants should give orders from time to time to the plaintiffs for the purchase and the sale on account of the defendants of equal amounts of pork to be delivered in the future; that the plaintiffs should, in their own names,

make these purchases and these sales on the board of trade; that the plaintiffs should, at or before the time of delivery, procure these contracts to be set off against each other, according to the usages of that board; that the defendants should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be required to pay to the plaintiffs, and should only be entitled to receive from them, the differences between the amounts of money which the pork was bought for and was sold for; and that the defendants should furnish a certain margin, and should pay the plaintiffs their commissions.

The defendants gave orders in pursuance of this contract, the plaintiffs made the purchases and sales on the board of trade, set them off against each other, and now sue the defendants for the differences which they have paid and for their commissions.

The auditor has found that, "in a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts." In his supplemental report he says: "My conclusion is unchanged, that the parties to this suit entered into the dealings with each other, which are the subject thereof, with a clear understanding that actual deliveries were not contemplated and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case."

The peculiarity of this case, according to the findings of the auditor, is, that, while the contracts which the plaintiffs made on the board of trade must be taken to be legal, the plaintiffs have undertaken to agree with the defendants that these contracts should not be enforced by or against them, except by settlements according to differences in prices. If such an agreement seems improbable, it is enough to say that the auditor has found that it was made. The usages of the board of trade were such that the plaintiffs might well think that they risked little or nothing in making such an agreement. Indeed, the distinction in practice between the majority of contracts which by the auditor's report appear to be made and settled on the board of trade, and wagering contracts, is not very plain, and brokers, for the purpose of encouraging speculation and of earning commissions, might be willing to guarantee to their customers that the contracts made for

them on the board of trade should not be enforced, except by a settlement, according to differences in prices.

We do not see why the agreement between the plaintiffs and the defendants, that the defendants should not be required to receive or deliver merchandise, or to pay for or receive pay for merchandise, but should be required to pay to and to receive from the plaintiffs only the differences in prices, is not, as between the parties, open to all the objections which lie against wagering contracts. On the construction we have given to the auditor's report, the plaintiffs, in their dealings with the defendants, in some respects acted as principals. In making the contracts on the board of trade with other brokers, they may have been agents of the defendants. In agreeing with the defendants that they should not be compelled to perform or accept performance of the contracts so made, the plaintiffs acted for themselves as principals. If the defendants had made a contract with the plaintiffs to pay and receive the differences in the prices of pork ordered to be bought and sold for future delivery, with the understanding that no pork was to be bought or sold, this would be a wagering contract. On such a contract the defendants would win what the plaintiffs lose, and the plaintiffs would win what the defendants lose. But so far as the defendants are concerned, the contracts which the auditor has found they made with the plaintiffs are contracts on which they win or lose according to the rise or fall in prices, in the same manner as on wagering contracts. If the plaintiffs, by virtue of the contracts they made with other members of the board of trade, were bound to receive or deliver merchandise, and to pay or receive the price therefor, on the auditor's finding they must be held as against the defendants to have agreed to do these things on their own account, and that the defendants should only be bound to pay to them and to receive from them the differences in prices. If the defendants, as undisclosed principals, should be held bound to other members of the board of trade on the contracts made by the plaintiffs, the plaintiffs by the terms of their employment would be bound to indemnify the defendants, except so far as the contracts were settled by a payment of differences in prices. The agreement of the parties, as the auditor has found it, excludes any implied liability on the part of the defendants to indemnify the plaintiffs, except for money paid in the settlement of differences in prices. The position of the plaintiffs towards the defendants is no better than it would have been if

the plantiffs had been employed to make wagering contracts for pork on account of the defendants, and had made such contracts, because the plaintiffs, relying upon the usages of the board of trade, have undertaken to agree with the defendants that whatever contracts they make shall bind the defendants only as wagering contracts, and shall be settled as such.

The plaintiffs contend that even if the contracts which the defendants authorized them to make and which they made on the board of trade had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants.

In *Thacker* v. *Hardy*, 4 Q. B. Div. 685, the court found that the plaintiff was employed to make lawful contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 and 9 Victoria, chapter 109, section 18. Lindley, J., in giving the opinion at the trial, said, at page 687: "What the plaintiff was employed to do was to buy and sell on the stock exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred: *Cannan* v. *Bryce*, 3 Barn. & Ald. 179; *McKinnell* v. *Robinson*, 3 Mees. & W. 434; *Lyne* v. *Siesfield*, 1 Hurl. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch* v. *Jones*, 5 El. & B. 238, is plain to that effect." On appeal, Brett, L. J., said, at page 694: "It was further suggested in *Cooper* v. *Neil*, Week. Not., June 1, 1878, that the agreement was, that although the plaintiff being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon

the stock exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 and 9 Victoria, chapter 109, section 18, but I thought that there was no evidence of it. And with respect to the present action, I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England, wagering contracts concerning stocks or merchandise are not illegal at common law, and all the judges in *Thacker* v. *Hardy* were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In *Irwin* v. *Williar*, 110 U. S. 499, 510, the supreme court of the United States says of wagering contracts: "In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable: *Thacker* v. *Hardy*, *supra;* while generally, in this country, all wagering contracts are held to be illegal and void as against public policy: *Dickson's Ex'r* v. *Thomas*, 97 Pa. St. 278; *Gregory* v. *Wendell*, 40 Mich. 432; *Lyon* v. *Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Melchert* v. *American Union Telegraph Co.*, 3 McCrary, 521; 11 Fed. Rep. 193, and note; *Barnard* v. *Backhaus*, 52 Wis. 593; *Kingsbury* v. *Kirwan*, 77 N. Y. 612; *Story* v. *Salomon*, 71 Id. 420; *Love* v. *Harvey*, 114 Mass. 80." In considering how far brokers would be affected by the illegality of contracts made by them, that court says: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." This was decided in *Embrey* v. *Jemison*, 131 U. S. 336. See also *Kahn* v. *Walton*, 46 Ohio St. 195; *Cothran* v. *Ellis*, 125 Ill. 496; *Fareira* v. *Gabell*, 89 Pa. St. 89; *Crawford* v. *Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745; *Lowry*

v. *Dillman*, 59 Wis. 197; *Whitesides* v. *Hunt*, 97 Ind. 191; 49 Am. Rep. 441; *First National Bank* v. *Oskaloosa Packing Co.*, 66 Iowa, 41; *Rumsey* v. *Berry*, 65 Me. 570.

It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here, that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal: *Bishop* v. *Palmer*, 146 Mass. 469; 4 Am. St. Rep. 339; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law: *Embrey* v. *Jemison*, 131 Id. 336, and the other cases there cited.

We are of opinion that the instruction of the presiding justice, that on the auditor's report the plaintiffs were entitled to a verdict, cannot be sustained. Whether, on the auditor's report, the defendants were entitled to a ruling directing the jury to render a verdict in their favor, or whether the case should have been submitted to the jury for the reasons stated in *Peaslee* v. *Ross*, 143 Mass. 275, is a question which has not been carefully argued, and upon which we express no opinion.

Exceptions sustained.

JUDICIAL NOTICE will not be taken of the laws of sister states, and in the absence of proof, the law of a sister state will be presumed to be the same as that of the forum; and upon common-law questions, where the common law prevails in the forum, it will be presumed to exist in the sister state: Note to *Lanfear* v. *Mestier*, 89 Am. Dec. 672, 673.

In the case of *State ex rel.* v. *Insurance Co. of North America*, 115 Ind. 257, it was held that the laws of sister states upon the subject of insurance are merely facts, and must be pleaded and proved as other facts.

WAGERING CONTRACTS, WHAT ARE. — As to the validity of contracts to deal in futures or margins, and the enforcement of the relations growing therefrom: *Sondheim* v. *Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and particularly note 33, 34; *Floyd* v. *Patterson*, 72 Tex. 202; 13 Am. St. Rep. 787; *McNamara* v. *Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355. Where it is understood by all the parties to a contract that the commodity said to be sold

is neither delivered nor paid for, but the contract is to be settled by the vendor and purchaser according to the advance or decline of the market, paying the difference between the contract price and the market price, the contract is a wager, and void; and a promissory note executed in the course of such a transaction cannot be enforced by the payee: *Davis* v. *Davis*, 119 Ind. 511.

WAGERING CONTRACTS. — The mere racing of horses is not illegal or against public policy; so where a premium is offered by a third party, in good faith, not as a bet, to be given to the winner in a horse-race, the winner may recover such premium, even though he paid an entrance fee, which formed a part of the premium: *Porter* v. *Day*, 71 Wis. 296.

RECOVERY OF MONEY LOST UPON WAGERS. — Under the statutes of Nebraska and New Hampshire, money lost and paid upon wagers or bets may be recovered back in a civil suit by the loser against the winner: *Watts* v. *Lynch*, 64 N. H. 96; *Perry* v. *Gross*, 25 Neb. 826. A bet upon a foot-race between two persons is gaming, within the meaning of the Massachusetts statute providing for an action to recover back money lost at gaming in a suit against the winner: *Jones* v. *Cavanaugh*, 149 Mass. 124.

HODGKINS *v.* FARRINGTON.

[150 MASSACHUSETTS, 19.]

ORAL LICENSE TO DO ANY ACT ON THE LAND OF ANOTHER GIVES THE LICENSEE NO INTEREST in the land, and is revocable, not only at the will of the owner of the property on which it is to be exercised, but by his death, or his alienation or demise of the land, and by whatever would deprive the original owner of the right to do the acts in question, or give permission to others to do them.

ORAL LICENSE GIVEN TO ONE WHO IS ERECTING A BUILDING to insert its timbers into a wall on the land of a person giving such license, though followed by the erection of the building and the insertion of the timbers, may be revoked by any one who subsequently becomes the owner of the land, by giving notice of such revocation, and requesting the then owner of the building to remove the timbers. The fact that the plaintiff will sustain no substantial injury if the wall remains as it is, and that the defendants will suffer heavy loss if it is removed, and they are compelled to take out their timbers, will not prevent the plaintiff from maintaining a bill in equity to compel their removal.

LACHES IN NOT COMPELLING ONE TO REMOVE TIMBERS, which he inserted in a wall on the plaintiff's land by the oral license of plaintiff's predecessor in interest, will not prevent plaintiff from maintaining a bill in equity to compel such removal, if such timbers have not been kept in their present position a sufficient length of time to create a prescriptive right to have them continue undisturbed.

EASEMENT, COMPELLING SUBMISSION TO. — AN OFFER TO PAY PLAINTIFF THE DAMAGES caused by the retention of a wall in its present site will not defeat his right to remove such wall if it is on his land. One cannot be compelled to sell his land, nor to grant an easement therein.

BILL in equity to compel the removal of a part of a building standing on the estate of plaintiffs, and for damages.

R. M. Morse, Jr., and C. S. Hamlin, for the plaintiffs.

W. B. French, for the defendants.

DEVENS, J. In 1841, the premises of the plaintiffs were owned by Robert Burr, and those of the defendant Farrington by Noah Blanchard, a house standing on the front part of each lot, with a yard in the rear. On August 1st of that year, the boundary line between their respective lots was established by a straight line, that ran "through the center of the brick wall separating the two houses, and by the northeasterly side of a wall separating the two yards." The brick garden-wall which separated the two yards was fifty-four feet in length and eight inches thick, with the exception of a twelve-foot section, which was twelve inches thick. Ten inches in thickness of the twelve-foot section was on the plaintiffs' land, and two inches on that of the defendant, the remainder of the garden-wall being wholly on the plaintiffs' land.

In September, 1871, Robert Burr having deceased, his widow and his son, Robert Burr, Jr., became his executors, with power to mortgage, sell, or lease his real estate. By the will of Robert Burr, Mrs. Burr was the owner in fee of one third of this parcel of real estate, having a life estate in the other two thirds, the fee in which was in his children. It was agreed orally by Robert Burr the younger and his mother that James W. Merriam, who then owned the Blanchard estate, and who desired to extend his building, might top out the garden-wall, and let his timbers into the same as thus built up, but that it must remain a part of the Burr estate. Burr supposed, although no agreement to this effect was shown, that Merriam would line the old wall four inches in width on his own land, and, although he might on inquiry have ascertained, did not in fact know that Merriam did not make the wall twelve inches in width, and thus carry it up. It does not appear that Burr was in any way intentionally deceived as to this matter by Merriam, who underpinned and carried up the garden-wall to the requisite height (a part of his extension being four stories in height), and inserted his timbers therein, adding nothing to the width of the wall on his own land.

The defendant Farrington claims title through several mesne conveyances from Merriam. The deed to him, the mortgage to the savings bank, and the lease to Johnson, whose admin-

istrator was made a defendant as well as the savings bank, exclude in their description all that portion of the wall alleged by the plaintiffs to be theirs; nor has either of them repaired or interfered with the wall; but the timbers have been allowed to remain where they were inserted therein.

We cannot perceive that the defendants can have any higher rights in this matter than those of licensees. Even if the Burrs, by their authority as executors, or Mrs. Burr, by her ownership in fee of one third of the estate and her life tenancy in the other two thirds, could have created an interest in the real estate, they did nothing which could bind the Burr estate, or subject it to an encumbrance when it became the property of another. A paramount right to hold another's land subject to a particular purpose, to enter upon it, or to maintain structures upon it without the consent of the owner, is an important interest in the land which cannot pass without the formalities required by the statute: R. S., c. 59, sec. 29; Id., c. 74, sec. 1; Pub. Stats., c. 78, sec. 1; Id., c. 120, sec. 3. An oral license to do any act on the land of another does not trench upon the policy of the law, which requires that contracts respecting any title or interest in real estate shall be by deed or in writing. It gives the licensee no estate or interest in the land. It excuses acts done which would be trespass, or otherwise unlawful. It is revocable, not only at the will of the owner of the property on which it is to be exercised, but by his death, by alienation or demise of the land by him, and by whatever would deprive the original owner of the right to do the acts in question, or give permission to others to do them: *Cook* v. *Stearns*, 11 Mass. 533; *Stevens* v. *Stevens*, 11 Met. 251; 45 Am. Dec. 203; *Clapp* v. *Boston*, 133 Mass. 367.

To the rights of licensees the defendants are entitled. Before there had been any alienation of the land by the Burrs, the structure of Merriam was completed. It has been maintained during the successive changes of title, without any objection by the respective owners of the plaintiffs' estate to the additional erection on the wall, or to its use as a support to the defendant Farrington's building, until, very shortly before the bringing of this bill, the plaintiffs notified Farrington to remove the timbers resting on their land. The plaintiffs, when they acquired title, knew the situation of the wall, and the support of the timbers therein, and that the wall, with the exception of the two inches in thickness of the twelve-foot section, was on their land. Under these circumstances, before the de-

fendants could be treated as trespassers, they were entitled to know that the permission received from or assented to by former proprietors of the plaintiffs' estate was withdrawn, and that they could no longer rely on any license. That which a licensee has already done does not become unlawful by the revocation of the license, if it be an act done on the premises of the licensor, as if he has erected a structure thereon, but the licensee loses his right to continue to maintain it.

The erection of the superstructure on the wall, in the case at bar, by Merriam, and the insertion of the timbers therein, were not unlawful when constructed, but the defendants have lost the right to continue them. If they do not remove them, the plaintiffs have the right to do this or have it done, even if serious injury thereby results to the defendants. The fact, if it be so, that the plaintiffs will suffer no substantial injury if the wall remains as it is, while the defendants will suffer a heavy loss if the wall is removed, and they are thus compelled to take out their timbers and erect a new wall on their own land to support their building, cannot give them a right to use the plaintiffs' property if they have no legal interest therein.

In *Stevens* v. *Stevens*, *supra*, the defendants' grantor erected a dam on the land of the plaintiffs' grantor. The plaintiffs, subsequently acquiring title to the land, notified the defendants to remove it, and, the notice being disregarded, commenced its removal. While the plaintiffs were thus engaged, the defendants entered and restored so much of the dam as had been removed, making some additions to it. A bill in equity was then brought to have the dam abated as a nuisance. It was held that, while for several years the defendants had enjoyed the privileges allowed by their license before the same was countermanded by the plaintiffs, they were not responsible for any acts done by them in pursuance of said license and permission; that they were not, therefore, liable to pay any expenses for the removal of the old dam, although the same might be removed by the plaintiffs. So far as they had built a new dam, or repaired and made additions to the old one after the license was countermanded, the defendants were held liable, and the plaintiffs were deemed entitled to have the same abated at the expense of the defendants.

It is said, in the case at bar, by the defendant Farrington, that it is enough for him to establish the fact that the addition to the wall was lawfully erected, and the timbers of his

building lawfully inserted, and that this will be a sufficient answer to the plaintiffs' bill as framed. He, by his answer denying the allegations of the plaintiffs' bill, practically asserts his right to have the wall maintained as it now exists, and to keep his timbers inserted therein. The plaintiffs are not compelled, in the assertion of their rights, actually to remove or to attempt to remove the wall and timbers, and thus to encounter the danger of a collision with the defendants. When their claim is denied, it is a much safer and more pacific proceeding to have its validity ascertained by a court than to undertake to assert it in any forcible way. Applying the principles of *Stevens* v. *Stevens*, *supra*, the plaintiffs are entitled to a decree authorizing them to remove the wall so far as it stands upon their land, and also the timbers, so far as they project over it, but at their own expense, as the structure has become unlawful only since the license under which it was erected has been countermanded, and to an injunction forbidding the defendants from interfering with them in so doing, unless, within a brief time to be named in the decree, the defendants shall themselves remove the wall and timbers.

It is contended that the plaintiffs are bound by the acquiescence and laches of their predecessors in title, so that they cannot maintain this bill. Easements by prescription in land are only to be acquired by adverse user thereof for twenty years. Even if the user by the successive owners could be tacked one to the other, this time has not elapsed: *Leonard* v. *Leonard*, 7 Allen, 277. It does not even appear to have been known to any one of these owners before Lucinda C. Collamore, the plaintiffs' immediate grantor, that the whole wall was on the plaintiffs' land, with the exception of two inches in thickness of the twelve-foot section, nor does it appear that she then knew of the defendants' claim to an oral license. This was in November, 1887, and in December, 1887, she conveyed to the plaintiffs, as her trustees, who requested the defendants, in the February following, to remove their building from the wall, and who brought their bill in March. The defendants have not been prejudiced by any delay of the plaintiffs' predecessors in bringing the bill, and the plaintiffs themselves have acted with promptitude. The discovery (as it may perhaps be called) of the situation of the wall was made as such discoveries have often been made, when the proposed erection of new buildings has rendered it necessary carefully to investigate the boundary lines of conterminous

estates. Owners of property are not bound at their peril to prevent every illegal encroachment on their estate. Even if, by reason of mistake on their own part, buildings are erected on their premises by their own consent, they may be relieved from the encumbrances thus created, where they have not continued for twenty years: *Proctor* v. *Putnam Machine Co.*, 137 Mass. 159.

The principles upon which it has been held that a party plaintiff applying for equitable relief will be refused when he has unreasonably and without proper objection permitted another to erect any structure on his own land in violation of some contract, condition, or agreement which the plaintiff is entitled to enforce, have no application where the structure complained of is on the plaintiff's own land, and where the act of the defendant in erecting or maintaining it is an invasion of the owner's rights therein: *Whitney* v. *Union R'y*, 11 Gray, 359; 71 Am. Dec. 715.

The defendant Farrington, in his answer, offers to pay the plaintiffs their damages caused by the retention of the wall on its present site, and requests that the bill may be dismissed, with costs, unless the plaintiffs grant to him an easement in the wall or the fee to one half the soil upon which it stands, upon payment of an equitable sum as compensation therefor. We have no right to refuse the plaintiffs the relief to which they are entitled, if they decline to sell their land or to grant an easement therein. The embarrassment in which the defendants find themselves simply results from their acts and those of their predecessors in failing to observe the well-known rules of law as to the creation of easements in the real estate of others, and in seeking to establish rights therein without any proper title.

Decree for the plaintiffs.

LICENSES. — As to when parol licenses are revocable, and when irrevocable: *Johnson* v. *Skillman*, 29 Minn. 95; 43 Am. Rep. 192, and extended note 195–199; *Hazleton* v. *Putnam*, 3 Pinn. 107; 3 Chand. 117; 54 Am. Dec. 158, and note 166, 167; *Rerick* v. *Kern*, 14 Serg. & R. 267; 16 Am. Dec. 497, and particularly extended note 501–506; *Fluker* v. *Georgia etc. Co.*, 81 Ga. 461; 12 Am. St. Rep. 328. A parol license may be revoked before it is executed: *McCarthy* v. *Mutual R. Ass'n*, 81 Cal. 584. While a mere naked license to use the land of another may be revoked at the will of the licensor, yet where a consideration has been paid, or value parted with, in faith of which the licensee presumed that the license would be perpetual, the license cannot be revoked to the injury of the licensee: *Nowlin* v. *Whipple*, 120 Ind. 596.

In *Wheelock* v. *Noonan*, 108 N. Y. 179, where the plaintiff gave defendant

parol license to place rocks upon his unoccupied land, under assurance from defendant that he would remove them in the following spring, no consideration being paid by the licensee, and during the winter, without the knowledge of plaintiff, defendant covered six lots with heavy boulders, upon the discovery of which in the spring plaintiff ordered defendant to remove such boulders, it was held that the original license did not justify defendant's action, and upon its revocation by the licensor, defendant became a trespasser, and continued as such till the removal of the rocks.

HYLAND *v.* HABICH.

[150 MASSACHUSETTS, 112.]

GUARANTY, TERMINATION OF, BY DEATH. — If a mortgage is given to secure such indebtedness as may afterwards accrue from the sale of goods by the mortgagee to a third person, this amounts to a guaranty by the mortgagor, and is terminated by his death. For such goods as are sold after the mortgagor's death, the mortgage does not operate as a security.

BILL to redeem lands from a mortgage. The defendant, Habich, was a resident of Germany. Bridget Hyland gave defendant a mortgage to secure all indebtedness which her husband, Matthew, was then under to the defendant, "and also the price or value of all such wares, goods, or merchandise as may be purchased or consigned to said Habich, and all notes and obligations given or to be given therefor." On October 17, 1887, Bridget Hyland died, and the fact of her death was made known to defendant on the same day. The question was, whether any order to affect a redemption was necessary for the plaintiff to pay indebtedness arising from sales made to the mortgagor's husband after her death.

S. M. Thomas, for the plaintiffs.

A. M. Alger, for the defendants.

KNOWLTON, J. The mortgage, which under the agreed statement of facts the plaintiffs seek to redeem, was given to secure the payment, — 1. Of an existing indebtedness due from Matthew Hyland; and 2. Of such indebtedness as might afterwards accrue from the sale or consignment of goods to said Hyland. The debt then existing was long ago paid, and we need to consider only that part of the mortgage which relates to the indebtedness thereafter to be contracted.

The language of the condition in the mortgage impliedly gave the mortgagee a right to sell goods to said Hyland for

an indefinite time upon the faith of this security. It was like an ordinary continuing guaranty of payment for goods to be sold, except that, instead of a personal undertaking to pay as a guarantor, it was a transfer of the estate as security for the payment. The mortgagee had the same right to sell, trusting to the security, and there were the same limitations upon his right as if the mortgagor had given merely a personal continuing guaranty. He had an implied authority from the owner of the mortgaged estate, which was subject to revocation at any time, and which would be revoked by the death of the owner. The principles laid down in *Jordan* v. *Dobbins*, 122 Mass. 168, are decisive of this case.

The defendants urge that a conveyance of property as security implies that the authority to sell is to continue after the death of the owner, until the owners of the estate see fit to revoke the authority. But we see no good ground for this contention. If the security were by a mortgage of personal property, there would be no one after the death of the mortgagor who could revoke the authority until the appointment of an administrator. In the mean time, the property might be charged to its full value. And if the mortgage were of real estate, different heirs might disagree as to the action to be taken. We are of opinion that the right to sell upon the faith of the guaranty rests upon a continuing authority, and that, where a mortgage is given, instead of a personal promise as security, the authority proceeds from the mortgagor, and is terminated by his death. Even in England, where it is held that such a guaranty is terminated, not by the death of the guarantor, but by notice of his death, the knowledge which the mortgagee in the present case had of the death of the mortgagor would be deemed constructive notice sufficient to determine his right to sell on the faith of the security: *Harriss* v. *Fawcett*, L. R. 15 Eq. 311; L. R. 8 Ch. 866; *Coulthart* v. *Clementson*, 5 Q. B. Div. 42, 47; *Lloyd* v. *Harper*, 16 Ch. D. 290, 314, 319.

Under the agreement of the parties, the plaintiffs are entitled to redeem upon the payment of $1,490, with interest from July 28, 1888, and costs.

Decree accordingly.

GUARANTY. — A contract of guaranty does not terminate with the life of the guarantor, unless this intention is plainly expressed in the guaranty itself: *Kernochan* v. *Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744. But a guaranty of the payment for goods to be sold to another, not founded upon

any consideration passing to the guarantor, is revoked by his death: *Jordan v. Dobbins*, 122 Mass. 168; 23 Am. Rep. 305; still, the death of the guarantor, without notice to or knowledge by the creditor, will not defeat the latter's indemnity for advances made in good faith after that event: *Menard v. Scudder*, 7 La. Ann. 385; 56 Am. Dec. 610.

MYERS *v.* HUDSON IRON CO.

[150 MASSACHUSETTS, 125.]

EMPLOYEE DOES NOT ASSUME THE RISK OF THE SAFETY OF MACHINERY UNLESS HE KNOWS the danger, or it is so obvious that he will be presumed to know it. He takes the risk of known dangers, and not of others.

EMPLOYEES CANNOT BE HELD, AS A MATTER OF LAW, TO HAVE ASSUMED THE RISK of a wire rope, drum, or other appliances on the surface of a mine used in lowering them to their place of labor underground, when it was no part of their duty to operate such appliances, and they were not clearly and obviously dangerous and unfit for use. An employee may rely somewhat upon the expectation that his master will provide machinery for lowering him to his work, and is therefore not called upon to be very strict in examining into its safety.

EMPLOYER AND EMPLOYEE — SAFETY OF MACHINERY. — The verdict of a jury in favor of employees, who have been injured by the falling of a bucket in which they were riding, is supported by evidence which tends to show that there was a want of sufficient power in the brake, and the absence of anything to stop the bucket in case the brake should fail; that the defendants had in other places other contrivances, which were better than those used where the accident occurred; and that the original efficiency of the brake had been removed by use.

AN EMPLOYER IS ANSWERABLE TO HIS EMPLOYEES WHO HAVE BEEN INJURED BY A DEFECT IN MACHINERY, though he had employed a machinist to put it in good order, if the latter failed to do so, though there was no reason to suppose him not to be well qualified for his duty.

DUE CARE. — THE FACT THAT NO ONE HAD EVER BEFORE BEEN INJURED in descending the shaft of a mine is not conclusive that the mine-owner had exercised due care in selecting and keeping in proper repair the appliances by which such descent was effected, when an accident has actually occurred, and there is evidence tending to show that the original efficiency of such appliances has been impaired.

JOINT NEGLIGENCE OF MASTER AND FELLOW-SERVANT. — Where the negligence of a fellow-servant and want of due care on the part of the master jointly contribute to an accident, the master may be held answerable to a servant injured thereby.

EVIDENCE THAT OTHER MACHINERY WAS SAFER than that used by the defendant at the time when the accident occurred is admissible to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use.

EVIDENCE OF FORMER SLIPS IN MACHINERY by which plaintiffs were injured, brought home to the knowledge of defendant's superintendent, is admissible, as tending to prove that the machinery was insufficient, and that the defendant did not exercise reasonable care in continuing its use.

ACTIONS of tort for personal injuries suffered by plaintiff while in employment of the defendant corporation, by falling down a mining-shaft by reason of defects in the machinery.

H. L. Dawes, T. P. Pingree, and M. Wilcox, for the defendant.

J. F. Noxon and W. Turtle, for the plaintiffs.

C. ALLEN, J. The several plaintiffs, who were underground-laborers in the defendant's mine, were undertaking to descend into the mine through a perpendicular shaft by means of a bucket, as they had been in the habit of doing. The bucket was supported by a wire rope or cable, which wound around a drum, and it was usually controlled in its descent by means of a shoe-brake, which pressed upon the rim of the drum. This shoe-brake was operated by the defendant's assistant engineer, by means of a lever. On the occasion of the accident, the plaintiffs had all entered the bucket, and, upon word being given, the assistant engineer started to let down the bucket, and after it had descended a few feet he found the brake was not holding, and the bucket fell rapidly for about 125 feet, when it was suddenly stopped by landing-planks across the shaft, and the plaintiffs were hurt. At the trial, much evidence was introduced by the plaintiffs and by the defendant, at the conclusion of all of which the defendant requested the court to instruct the jury to return verdicts in its favor; but the court declined to do so, and submitted the cases to the jury, who returned verdicts for the several plaintiffs. There was no request for any special instruction as to the rules of law applicable to the cases, and no exception was taken to the instructions which were actually given to the jury; but the defendant's complaint is, that the whole evidence was insufficient to warrant the verdicts for the plaintiffs.

One ground upon which the defendant has relied in the argument before us has been, that, upon the facts disclosed, the plaintiffs must be held to have assumed the risk of the safety of the machinery. There are many cases in which plaintiffs have for this reason been held to be debarred from recovering damages for injuries. But in the present case we do not find undisputed facts sufficient to make such a course proper. The risk of the safety of machinery is not assumed by an employee, unless he knows the danger, or unless it is so obvious that he will be presumed to know it. He takes the risk of known or

obvious dangers, and not of others: *Scanlon* v. *Boston etc. R. R.*, 147 Mass. 484, 487; 9 Am. St. Rep. 733; *Ferren* v. *Old Colony R. R.*, 143 Mass. 197; *Linch* v. *Sagamore Mfg. Co.*, 143 Id. 206; *Ford* v. *Fitchburg R. R.*, 110 Id. 240, 259; 14 Am. Rep. 598. It was no part of the plaintiffs' duty to operate the machinery for lowering the bucket. Their work was underground. We cannot say that the risk was so obvious that they must be held to have assumed it. The defendant even now strongly resists the inference that the machinery was in fact dangerous or unsuitable for use, and argues that the evidence conclusively shows the contrary. The plaintiffs might well rely somewhat upon the expectation that the defendant would provide proper machinery for lowering them to their work, and they were not called upon to be overstrict in an examination into its safety. We cannot say that, as matter of law, the plaintiffs must be held to have taken the risk, and that for this reason they are debarred from a recovery.

We have next to consider whether there was sufficient evidence to warrant a finding by the jury that the defendant did not exercise reasonable care in providing a safe machine. The court instructed the jury, in terms to which no exception was taken, that the defendant was not bound to procure and maintain machinery which should be absolutely safe, or to furnish the best appliances which were known or conceivable; that the question for the jury was, not whether the defendant omitted something which it could have done, or could have supplied, to make its structures or machinery more safe, but whether in selecting and maintaining the same for use it was reasonably prudent and careful; and that the fact that there were other kinds of machinery and apparatus might be taken into account in determining whether the defendant exercised due and sufficient care. The only question upon this part of the case, therefore, is, whether the plaintiffs were entitled to go to the jury upon the charge of a want of due care on the part of the defendant. The defects relied upon were, a want of sufficient holding power in the brake, and the absence of any contrivance sufficient to stop the bucket in case the brake should fail. In reference to the brake, the plaintiffs introduced evidence tending to show that in its design and original construction a shoe-brake of the dimensions used in this instance was insufficient; that the defendant itself had in use elsewhere two other contrivances, namely, a strap-brake, which would come in contact with more of the surface of the brake-band and a

friction V, so called, either of which would hold better than the shoe-brake; also that a clutch machine which could be operated by a reversible engine both ways, in descending as well as in ascending, would be safer. The plaintiffs also introduced evidence tending to show that in various ways the original efficiency of the shoe-brake had become impaired; namely, that the brake-band had been worn from a smooth surface into ridges by nails used in fastening the leathers to the wooden part of the brake; that the brake-shoe did not cover the whole width of the brake-band, but was allowed to extend over the front edge; that the shaft on which the drum revolved, and the boxes of the drum, had become so worn that there was about a quarter of an inch space between the shaft and the box of the drum; that by reason thereof a larger quantity of oil ran out upon the head and band of the drum than would otherwise have done; that the holding qualities of the leather on the brake had been impaired from the effect of steam; and that in all these various ways the brake had become less efficient than it had been at the outset.

The plaintiffs also introduced evidence tending to show that the clutch-gear, which was used in hoisting ore from the mine, but which was disengaged when the bucket was to be lowered, might by possibility be used to stop the descent of the bucket in case of the shoe-brake's failing to hold; and that this, by reason of wear and of a change which had at one time been made by beveling the faces of the horns of the clutches, had become less useful as a possible means of arresting the descent of the bucket, and that in fact it had proved ineffectual to stop such descent at the time of the accident. The defendant in reply introduced much evidence which certainly was sufficient to serve as the basis of a strong argument, to the effect that due care had been used in providing and maintaining the machinery in question; but we are unable to say that this evidence so conclusively overcame the force of the plaintiffs' testimony as to require from the jury a finding in favor of the defendant. It appeared, amongst other things, that, three weeks before the accident, a machinist, Parker, was employed to put the machine in good order; but if he failed to do so, and if after the completion of his work defects remained, the defendant was responsible, although it may have had reason to suppose him well qualified for his duty: *Moynihan* v. *Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348; *Daley* v. *Boston etc. R. R. Co.*, 147 Mass. 101, 114.

The defendant greatly relies upon the fact that no person had ever before been injured in descending the shaft by means of this bucket, although it had been much used for that purpose, and urges us to adopt and apply to the present case a rule stated by the court of appeals of New York in the following terms: "When an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of imprudence or carelessness": *Stringham* v. *Hilton*, 111 N. Y. 188, citing *Lafflin* v. *Buffalo etc. R. R. Co.*, 106 Id. 136; 60 Am. Rep. 433; and *Burke* v. *Witherbee*, 98 N. Y. 562. But it is hardly practicable to express by a single formula a rule which shall be applicable to all cases. The rule above stated may have needed no qualification as applicable to the case then before that court. The court had already declared that "there is no ground for an apprehension even that the machine or its appliances had been impaired by use, or that, for any reason, it was less safe or efficient than at first"; and again: "If there was any defect, it must have been in its original construction"; and it held that the undisputed evidence showed that the machine was sufficient in its construction, and was of a kind commonly in use when it was put in, and that it was plain that the injury to the plaintiff was caused by the act of the engineer, who was a fellow-servant with the plaintiff. In the present case, the fact that no person had previously been hurt in descending the shaft was entitled to much weight; but in our opinion it was not conclusive of the defendant's due care, especially in view of the evidence tending to show that the original efficiency of the brake had become impaired. The defendant also urges that we should reach the same conclusion arrived at by the court in that case, to wit, that the injury to the plaintiffs was caused by the act or negligence of the engineer. But this, in the case before us, was a matter for the jury, rather than for the court. No special ruling was asked for at the trial as to the effect of negligence of a fellow-servant, if proved, and we have only to consider whether the court should have withdrawn the case from the jury. If the defendant failed to use due care, it might be held responsible, although the negligence of a fellow-servant with the plaintiffs contributed to the accident; but if we could see that the accident was caused solely by the neglect of a fellow-servant, the plaintiffs would not be entitled to recover: *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143, 145;

12 Am. St. Rep. 526, and cases there cited. As has often been stated, each case must depend on its own circumstances. In the present case, we cannot say that it conclusively appears that the accident occurred solely from the neglect of the engineer. There are indeed strong arguments in favor of the defendant, which might be urged to any tribunal dealing with the facts; but we are not called upon to decide as to their weight, further than to say that they do not convince us that it was the duty of the court to hold, as matter of law, that there was no evidence which would warrant verdicts for the plaintiffs. We think the jury who viewed the premises, and who saw and heard the witnesses, were warranted in finding verdicts for the plaintiffs, under the rules of law which were applicable to the cases.

Objections were made at the trial to the introduction of certain matters of evidence, which need to be considered. The plaintiffs were allowed to show that other machinery or appliances than those used by the defendant would have been safer; for example, a strap-brake, a friction V, so called, or a reversible engine. In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used at shaft No. 1: *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 294, 298. It does not follow, from the introduction of such evidence, that the defendant was bound to use the very safest or newest, or any particular, machinery or appliances; but, as "reasonable care" is a relative term, the jury might properly consider what could be done to secure safety, and the evidence was competent. The rule of law as to the master's duty, as has already been said, was given to the jury in terms to which no exception was taken.

The plaintiffs were also permitted to prove instances of slips, brought home to the knowledge of the defendant's superintendent, that had previously occurred in hoisting ores in the bucket in shaft No. 1. The defendant's objection to this evidence rests chiefly on the ground that, in hoisting ores, the clutch-gear was used, while in lowering the bucket, its descent was regulated by the shoe-brake. It is not stated in the bill of exceptions that an exception was taken at the trial to the admission of this evidence; but both parties have argued the question of its competency, and we think it was competent.

If the clutch-gear for any reason failed to hold, the brake might be used to check the descent of the bucket; in like manner, according to the contention of the plaintiffs, the clutch-gear might or ought to be available for the same purpose if the brake should fail to hold. There was evidence tending to show that, at the time of the accident to the plaintiffs, an attempt was made to check the descent of the bucket by means of the clutch-gear, but that it was not successful. The plaintiffs contended that the machinery, as a whole, with the shoe-brake and the clutch-gear, was insufficient properly to control the descent of the bucket, and was therefore unsafe and defective; and that the defendant did not exercise reasonable care in continuing its use. We think the evidence objected to was competent. The defendant contended that the machinery had uniformly proved adequate prior to the accident. The evidence in question tended to show the contrary. The defendant was at liberty to prove, if it could, that the former slips occurred from some other cause than a defect in the machinery. The possibility that this might be so did not render the evidence of such former slips incompetent: *Wooley v. Grand Street and Newtown R. R.*, 83 N. Y. 121, 130.

The plaintiffs contended that the holding quality of the leather of the brake had become impaired from the effect of steam, which came up out of the shaft in large quantities, and frequently came into the room where the machinery was; that it came from pipes, and from a pump used at the bottom of the shaft; and, as a part of the evidence tending to establish this, they were allowed to introduce evidence of the machinery down the mine, namely, the pump at the bottom of the shaft, operated by steam from the engine-building belonging to shaft No. 1, and its use, and the escape of steam from it into the engine-building. This was all with reference to the plaintiff's contention that the efficiency of the leather upon the shoe-brake had become impaired by the effect of the steam upon it; and was clearly competent. Whether the efficiency of the brake could or naturally would be thus impaired, whether there was steam enough to produce this effect, and whether in point of fact this effect had been thus produced, were all matters of fact. The circumstance that there had been no steam for seven hours before the accident did not render the evidence incompetent. There was evidence that there was water from condensed steam upon the brake-band when the bucket started to descend. But, besides, the plaintiffs' contention went fur-

ther, and they insisted that the quality of the leather had become impaired from the effect of the steam, which was habitually or often upon it.

Exceptions overruled.

ASSUMPTION OF RISKS BY SERVANTS. — As to what risks are assumed by a servant and what are not assumed by him when he enters upon service: *Magee* v. *North Pacific Coast R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69, and cases cited in note 75; *Prather* v. *Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263. One who, being employed by another to assist in loading heavy timbers upon a car, can, by looking, see that the hooks attached to the crane used in the work are dulled and incapable of safely holding the timbers raised by it, but who continues to stay in service without objection, will be deemed to have assumed the risk created by such defect: *Rietman* v. *Stolte*, 120 Ind. 314. So where the defects of a shunt-cord used by a servant were visible to him, and still he chose it for himself without compulsion, he assumed the risk of its use: *Piedmont etc. Co.* v. *Patterson*, 84 Va. 747.

MASTER AND SERVANT. — The master must, as a general rule, exercise reasonable care in providing suitable machinery, instruments, means, and appliances for his servants in their work: *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526, and note. But the duty of the master to furnish safe machinery does not extend to requiring him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of use, the adjustment of which is incident to the ordinary use of the machine: *Eicheler* v. *Hanggi*, 40 Minn. 263. In an action against a master for not furnishing proper appliances, the petition must allege that the master knew or should have known of the danger and defects in the appliances furnished: *Johnson* v. *Missouri P. R'y Co.*, 96 Mo. 340.

MASTER MAY BE RESPONSIBLE FOR INJURIES to his servants caused by his negligence, even though the negligence of a fellow-servant contributed to the result: *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526.

SEWARD *v.* HAYDEN.

[150 MASSACHUSETTS, 158.]

STATUTE OF LIMITATION ON NOTES PAYABLE ON DEMAND does not commence running until the day after that on which such notes bear date.

F. C. Griswold and F. L. Greene, for the plaintiff.

F. G. Fessenden, for the defendant.

KNOWLTON, J. This case presents for consideration the single question whether, in an action upon a promissory note payable on demand, the day of the date is to be excluded or included in reckoning the six years named in the statute of limitations. By the first of these modes of reckoning, a payeee would ordinarily have a few hours more, and by the second a few hours less, than six years within which to bring his suit. But in

computing time under statutes and contracts the law disregards fractions of a day, unless on account of the subject-matter, or for other important reasons, justice requires that they should be regarded. This rule is universally held applicable to computations under the statute of limitations. In reckoning from a day or a date, the rule generally adopted excludes the day from which the reckoning runs. Many early cases stated a distinction between computations from a day or a date, and computations from an act done or from an event. But this distinction does not rest upon a sound principle, and in most jurisdictions it is no longer recognized. The tendency of recent decisions is very strongly towards the adoption of a general rule which excludes the day as the *terminus a quo* in such cases. But this rule is not inflexible; and in the interpretation of a statute or contract, it yields to a manifest purpose or intention in conflict with it. In ordinary cases there is no reason why it should not be held applicable to the statute of limitations, as well as to other statutes; and in that particular there is nothing peculiar in the case at bar.

Presbrey v. *Williams*, 15 Mass. 193, laid down the doctrine that, in an action upon a promissory note payable immediately, the day of the date is to be included in computing time under the statute of limitations, and this case has often been referred to by judges and writers of text-books as stating the law of Massachusetts, and as having been followed in some other states. But the authorities on which it rested have since been overruled in England; and in this commonwealth, under other statutes, several decisions have been made which are in conflict with it. In *Bemis* v. *Leonard*, 118 Mass. 502, 19 Am. Rep. 470, the authorities in England and in Massachusetts were very elaborately reviewed, and it was decided that, under the General Statutes, chapter 123, section 57 (Pub. Stats., c. 161, sec. 69), which require the copy of the writ and of the return of the attachment of bulky personal property to be deposited in the town clerk's office "at any time within three days thereafter," the day of the attachment is to be excluded. The language of the statute there considered was substantially the same as that which we are considering, which requires actions to be commenced "within six years next after the cause of action accrued." Moreover, it is said, in the opinion in that case, that the decision in *Presbrey* v. *Williams*, *supra*, "can hardly stand with the later adjudications." So in applying the statute of limitations in a suit against an

executor or administrator, it was held in the case of *Paul* v. *Stone*, 112 Mass. 27, that, in computing the two years "from the time of his giving bond," the day upon which the bond is given is to be excluded.

We think the decisions in these and in some other cases in this court are so inconsistent with that in *Presbrey* v. *Williams*, *supra*, as virtually to have overruled it, and it can therefore no longer be considered an authority in this commonwealth.

The language of the opinion in *Fenno* v. *Gay*, 146 Mass. 118, had no reference to the question now before the court. The question in that case was, whether the note was payable immediately, or not until after a demand, and the language used was applicable to it.

For authorities in harmony with our construction of this statute, see *Lester* v. *Garland*, 15 Ves. 248; *Hardy* v. *Ryle*, 9 Barn. & C. 603; 4 Man. & R. 295; *Williams* v. *Burgess*, 12 Ad. & E. 635; *Webb* v. *Fairmaner*, 3 Mees. & W. 473; *Young* v. *Higgon*, 6 Id. 49; *Gorst* v. *Lowndes*, 11 Sim. 434; *Robinson* v. *Waddington*, 13 Q. B. 753; *Sheets* v. *Selden*, 2 Wall. 177, 190; *Cornell* v. *Moulton*, 3 Denio, 12; *Blackman* v. *Nearing*, 43 Conn. 56; 21 Am. Rep. 634; *Homes* v. *Smith*, 16 Me. 181, 183; *Menges* v. *Frick*, 73 Pa. St. 137; *Warren* v. *Slade*, 23 Mich. 1; 9 Am. Rep. 70; *Kimm* v. *Osgood*, 19 Mo. 60; *Smith* v. *Cassity*, 9 B. Mon. 192; 48 Am. Dec. 420.

Judgment for the plaintiff.

NEGOTIABLE INSTRUMENTS. — As to the running of the statute of limitations upon notes payable on demand, compare *O'Neil* v. *Magner*, 81 Cal. 631; *ante*, p. 88, and note.

ALLEN *v.* SOUTH BOSTON RAILROAD COMPANY.

[150 MASSACHUSETTS, 200.]

CORPORATION, LIABILITY OF, FOR FRAUDULENT ISSUE OF STOCK. — A corporation is answerable in damages if a certificate of its stock is issued to a purchaser thereof by its treasurer, with whom blank certificates, signed by its president, had been left, though all the stock which the corporation was entitled to issue had been previously issued and the treasurer fraudulently issued the certificate in question. The fact that certificates were transferable only upon the surrender of the old certificates, and that no old certificate was ever surrendered, does not relieve the corporation from liability, if the person to whom the stock was issued paid full value therefor and acted in good faith.

PURCHASER OF STOCK IN A CORPORATION DOES NOT ASSUME ANY DUTY to see that the vendor of such stock surrenders his certificate and transfers

it on the books of the corporation. This is a duty of the corporation towards both the seller and the purchaser, before it issues the new certificate.

NOTICE TO AN AGENT IS NOT IMPUTED TO HIS PRINCIPAL when the agent is engaged in the commission of an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. Hence a corporation remains answerable for the fraudulent issue of stock by one of its officers to whom it has given apparent authority to make such issue, though such officer is also the broker of the person to whom the stock is issued, when the latter acts in good faith, and has no personal knowledge of the fraudulent act of the officer.

MEASURE OF DAMAGES WHEN A CORPORATION IS SUED by one to whom a certificate of its stock has been fraudulently issued by one of its officers is the market value of such stock at the time when it first refused to recognize the certificate in question as valid, and to permit a transfer thereof.

ACTIONS in contract or tort to recover damages for the refusal of the defendant corporation to recognize as valid or to permit the transfer of shares of stock held by the plaintiffs. Judgment in the first case was entered for the plaintiff, and in the second case for the defendant.

J. E. Abbott, for the plaintiff in the first case.

S. Lincoln, for the plaintiff in the second case.

J. G. Abbott, C. T. Gallagher, and J. S. Dean, for the defendant.

FIELD, J. In the first case, William Reed, who was the treasurer of the defendant corporation and also a stock-broker, ordered Henshaw and Company, brokers, to sell for him, at auction, ten shares of the stock of the defendant, and the plaintiff, on November 25, 1882, bought of them the ten shares at auction, and paid them for the stock on November 28th; Henshaw and Company then executed and delivered a power of attorney to the plaintiff for the assignment of ten shares at any time within ten days from date, the names of the purchaser and of the attorney being left blank. The plaintiff, on November 29th, took this power of attorney to the office of the defendant, delivered it to Reed, the treasurer, who inserted in it his own name as attorney, and the name of the plaintiff as assignee. He then made out in the name of the plaintiff, and delivered to him, a certificate of ten shares of stock in the usual form, under the seal of the corporation, signed by the president and by himself as treasurer. The president was in the habit of leaving with Reed blank certificates of stock signed by him.

and one of these Reed filled up, and signed as treasurer, and delivered to the plaintiff. Reed afterwards entered on the transfer-book a transfer of ten shares from himself, as agent, to Henshaw and Company, and then a transfer of these ten shares by himself, as attorney for Henshaw and Company, to the plaintiff. Reed in fact had no stock, either as agent or in any other capacity, and the whole amount of stock which the defendant was authorized to issue had then been issued to other persons. The plaintiff acted in good faith, but Reed's intention was fraudulent throughout the whole transaction. The plaintiff was at this time the owner and holder of another certificate of four shares of stock, and after this he received dividends on fourteen shares, and his name as owner of fourteen shares was entered on the dividend sheets of the corporation, and in its annual returns, until the frauds of Reed were discovered, in 1886.

In the second case, the plaintiff was a stockholder of the defendant, and, having money to invest, in January, 1882, applied to Reed, as a broker, to buy for her eight additional shares of the stock of the defendant. Reed informed the plaintiff that he had bought the shares for her, and she in good faith paid him for them, and received from him a certificate in her name of eight shares of stock in the usual form, under the seal of the corporation, signed by its president, and by Reed as its treasurer. He obtained the certificate by filling up one of the blanks which the president had signed and left with him. Before doing this, he entered on the transfer-book of the defendant a transfer of eight shares to the plaintiff from himself as agent; but he in fact had no stock as agent or otherwise, and he bought no stock for the plaintiff, and the corporation had already issued all its capital stock. The plaintiff's name as holder of these shares was entered on the dividend sheets of the company, and semi-annual dividends were paid to her, and her name was also regularly entered as owner of these eight shares in the annual returns made to the commissioner of corporations until 1886, when this and many other frauds of Reed were discovered.

The agreed facts in both cases show gross carelessness on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books and discovering the fictitious transfers of stock made by Reed. In both cases, after the frauds were discovered, the defendant refused to recognize the certificates of stock as valid,

and refused to allow them to be transferred, or to issue new certificates.

The counsel for the defendant does not deny that, if these certificates of stock had been sold and duly assigned by the plaintiffs for value to one who had no knowledge that they had been fraudulently issued, the defendant would be liable in damages to the purchaser. He admits the general rule that a corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued: *Moores* v. *Citizens' National Bank*, 111 U. S. 156; *Boston and Albany Railroad* v. *Richardson*, 135 Mass. 473; *Machinists' National Bank* v. *Field*, 126 Id. 345; *Pratt* v. *Taunton Copper Mfg. Co.*, 123 Id. 110; 25 Am. Rep. 37; *New York and New Haven Railroad* v. *Schuyler*, 34 N. Y. 30, 64; *Titus* v. *Great Western Turnpike*, 61 Id. 237, 245; *Holbrook* v. *New Jersey Zinc Co.*, 57 Id. 616; *Shaw* v. *Port Philip Mining Co.*, 13 Q. B. Div. 103. But he contends that the plaintiffs were negligent in accepting the new certificates without taking pains to ascertain whether old certificates of a corresponding number of shares had been surrendered, and a transfer made upon the books of the company.

Each certificate of stock in the defendant company, as the plaintiffs knew, declared that the shares are "transferable by an assignment in the books of said company upon a surrender of this certificate. When a transfer shall be made in the books of the company, and this certificate surrendered, a new one will be issued." See Pub. Stats., c. 113, sec. 13.

The contention is, that one object of this provision was the protection of the corporation against the frauds of its officers in issuing false certificates, and that if the plaintiffs in these cases had required that a certificate of shares be delivered to them with an assignment of it, or a power of attorney to assign it, Reed could not have committed these frauds. We do not see why Reed, having been intrusted with blank certificates signed by the president, might not have issued certificates to himself, and then assigned them when the stock was sold, and on the surrender of the old certificates have issued new certificates. Perhaps the chances of detection would have been slightly greater if he had proceeded in this way. But certainly this provision regulating the transfer of stock, if

intended as a protection to the corporation against the frauds of its officers, is insufficient. The primary purpose of it undoubtedly was to prescribe the manner in which such intangible property as shares of stock should be transferred from one person to another, and it required the transfers to be made on the books of the company that the company might know who its stockholders were, and it required the surrender of the old certificate before the new one was issued, that there might not be two or more certificates outstanding for the same shares of stock.

The ground on which a corporation is held liable to a *bona fide* purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is, that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser. It is the duty of the proper officers of the corporation to ascertain that its stock has been transferred in accordance with its by-laws, and in accordance with law, before they issue a new certificate. The transfer, which must be made on the books of the company, must be made by the owner of the old certificate, or by his attorney for him. The surrender of the old certificate must also be made by him or by his attorney. There is no provision that it shall be made by the purchaser, as the assignee or the attorney of the seller. If the seller undertakes with the purchaser to make the surrender and the transfer on the books of the company, the only thing left for the purchaser to do is, to call upon the corporation for the new certificate. We see no good reason for holding that there is a duty on the part of the purchaser towards the corporation to see to it that the seller of stock surrenders his certificate and transfers it on the books of the corporation. That is the duty of the corporation towards both the seller and the purchaser before it issues a new certificate.

If the purchaser exhibits to the corporation a forged assignment of stock, or a forged power of attorney to assign it, and thus obtains a new certificate, which he sells, he is liable to the corporation, not because it is his duty to attend to the transfer of stock, but because he has impliedly represented the forged signature to be the genuine signature of a stockholder, whereby he has deceived the corporation: *Boston etc. R. R.* v. *Richardson*, 135 Mass. 473. Before the passage of the statute of 1884, chapter 229, if not since, the transfer of stock was usually at-

tended to by brokers, if the stock was bought and sold through brokers. Many shares of stock represented by a single certificate were often sold in parcels to many different persons, and the seller made but one surrender, with powers of attorney to transfer the parcels to the different purchasers. A purchaser of stock violated no duty to the corporation when he trusted to the seller to make the assignment and the surrender of the old certificate. The utmost that can reasonably be contended is, that the fact that a certificate was not exhibited and delivered with a power of attorney to the purchaser was a circumstance to be considered upon the question whether the purchaser acted in good faith and with due care.

In the first case, it is expressly agreed that "Henshaw and Company acted in good faith, and the whole transaction, on their part, was in accordance with their general custom, and in accordance with the general custom of brokers in Boston"; that "nearly all of the transfers of defendant's stock made on its books while said Reed was its treasurer, and being upwards of two thousand in number, were made by said Reed as attorney of the parties making the transfer"; and that "several hundred of said transfers, the validity of which has never been questioned by said corporation, were made by virtue of powers of attorney like that given by Henshaw and Company, and where no certificate of the stock so transferred was ever issued to the person or firm giving the power of attorney for the transfer," it not being "the general custom of brokers in the city of Boston to take certificates of stock in their own names," when "transferred to them for the purpose of sale." On these facts, we think it clear that Allen exercised due care in obtaining a transfer of the stock, and that Reed, in making the transfer, was not his agent, but the agent of Henshaw and Company, or the undisclosed principal. In issuing the new certificate, he was the agent of the defendant, and as the plaintiff cannot now be put *in statu quo*, the defendant must bear the loss.

In the second case, the plaintiff received from Reed, as broker, a certificate, in her name, of the stock which he said he had bought for her, and there is nothing to show that this was not the usual way in which brokers transacted such business. Apparently, Mrs. Craft acted as a purchaser through a broker usually acted, and we see no want of due care on her part.

Another question arises in her case from the fact that Reed.

who committed the fraud upon the defendant, was also her agent in the transaction. If he be regarded as acting in two capacities, and as having committed the fraud in his capacity as treasurer, he yet, as her agent, knew of and participated in it. Is this knowledge to be imputed to her in determining her rights against the defendant?

The general rule is, that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal: *Suit* v. *Woodhall*, 113 Mass. 391; *National Security Bank* v. *Cushman*, 121 Id. 490; *Sartwell* v. *North*, 144 Id. 188; *The Distilled Spirits*, 11 Wall. 356. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is, that an independent fraud, committed by an agent on his own account, is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established: *Kennedy* v. *Green*, 3 Mylne & K. 699; *Espin* v. *Pemberton*, 3 De Gex & J. 547; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *In re European Bank*, L. R. 5 Ch. 358; *Cave* v. *Cave*, 15 Ch. Div. 639; *Kettlewell* v. *Watson*, 21 Id. 685, 707; *Innerarity* v. *Merchants' National Bank*, 139 Mass. 332; 52 Am. Rep. 710; *Dillaway* v. *Butler*, 135 Mass. 479; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Id. 268; 9 Am. St. Rep. 698; *Howe* v. *Newmarch*, 12 Allen, 49.

This case seems to us to fall within this exception. Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that

was its legal effect; and it was a fraudulent act, committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it.

The present cases, we think, fall within the principle that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud.

The defendant cannot be compelled to issue new certificates or to recognize the old ones as valid, because to do so would cause an overissue of its capital stock; but it is liable in damages. In assessing damages, the superior court has taken the value of the stock to be its market value at the time when the defendant first refused to recognize the stock as valid, and to permit a transfer of it. This would be the rule of damages if the certificates were valid: *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Wyman* v. *American Powder Co.*, 8 Cush. 168. We think that the same rule of damages applies to these certificates: *In re Bahia and San Francisco Railway*, L. R. 3 Q. B. 584.

The cases having been submitted on agreed statements of fact, no question arises as to the form of the actions. Upon the plaintiffs severally filing in the superior court the certificates properly assigned to the defendant, judgments may be entered for the plaintiffs.

So ordered.

CORPORATIONS. — The acts of an authorized officer of a corporation are binding upon the corporation; and when he is acting within the apparent scope of his authority, one dealing with him is not bound to have knowledge of extrinsic facts making it improper for him to act in the particular case: *Credit Co.* v. *Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123.

CORPORATIONS ARE LIABLE to *bona fide* holders of fraudulent stock: *Supply Ditch Co.* v. *Elliott*, 10 Col. 327; 3 Am. St. Rep. 587. So where the treasurer of a corporation, whose duty it was to issue certificates of stock, fraudulently issued certificates in regular form, but not representing any real stock, and pledged them to secure money for himself, the corporation was liable to the pledgee, who had no notice of the fraud, for the money lent, and interest thereon: *Tome* v. *Parkersburgh R. R. Co.*, 39 Md. 36; 17 Am. Rep. 540; compare *Farrington* v. *South Boston R. R.*, 150 Mass. 406; *post*, p. 222.

AN AGENT'S KNOWLEDGE IS NOT IMPUTABLE to his principal when the agent is guilty of independent fraud upon his own account: *Innerarity* v. *Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Rep. 710; and compare *First Nat. Bank* v. *Drake*, 29 Kan. 311; 44 Am. Rep. 646; note to *Fairfield Savings Bank* v. *Chase*, 39 Id. 322–331.

ABBOTT *v.* HAPGOOD.

[150 MASSACHUSETTS, 248.]

PROPOSED CORPORATION, CONTRACT IN NAME AND FOR BENEFIT OF. — If contract is made in the name and for the benefit of a projected corporation, such corporation, after its organization, cannot become a party to the contract even by adopting or ratifying it.

CONTRACT MADE BY PROMOTERS OF A PROJECTED CORPORATION in its name and for its benefit must be treated as the contract of such promoters acting either jointly as individuals or as general partners, and they may, even after the organization of the corporation, maintain an action for a breach of such contract.

RES JUDICATA. — Judgment against a corporation suing upon a contract made before its organization, for its benefit, is not a bar to a subsequent action on the same contract for the same breach thereof, brought by the promoters of the corporation, who, before such organization, had entered into the contract in the name of the corporation, and for its benefit.

DAMAGES WHICH SHOULD BE AWARDED TO THE PROMOTERS OF A CORPORATION FOR A BREACH OF CONTRACT, entered into by them in the name and for the benefit of the proposed corporation, are not restricted to such as the plaintiffs themselves have suffered independently of their partnership association, but should include all the damages for which any recovery can be had by any one upon such contract for such breach; and where the contract was to furnish machinery which could not be procured in the market, the parties must be presumed to have contracted in reference to the declared purpose for which the machines were to be furnished, and that purpose may be considered in assessing the damages.

ACTION of contract brought by Francis R. Abbott, Charles Kee, and William B. Kempton against Herbert L. Hapgood and Alvord Smith, "late copartners under the name of Hapgood and Smith," to recover damages for breach of agreement to furnish certain match-machines and match-splints. The complaint was in three counts. The writ, dated May 12, 1888, described the plaintiffs as being "all of Philadelphia, in the state of Pennsylvania, as they are copartners and associated together in business under the firm name and style Penn Match Company, Limited." The first count was as follows: "The plaintiffs say the defendants, for a valuable consideration, entered into a contract with them, in their associated name and style of the Penn Match Company, Limited, to furnish the plaintiffs with one setting and one rolling-off machine for the manufacture of matches, which contract was reduced to writing, and signed by the defendants, a copy of which writing is hereto annexed, marked 'A'; that the machines so contracted for were not furnished on or before

April 1, 1882, as in said writing agreed, but that plaintiffs expressly waived the non-performance of said contract in point of time, and both parties agreed that the performance of the said contract should proceed after said specified time; that the plaintiffs performed and stood ready at all proper times to perform the said contract on their part, but the defendants, unmindful of their obligations thereunder, on the twenty-fourth day of May, 1882, refused to perform their said contract, and have ever since neglected and refused to perform the same, whereupon an action accrued to the plaintiffs for damages for the breach of said contract. And the plaintiffs further say that they suffered great loss and damage by reason of the breach of their said contract by the defendants; and specially allege that, in view of the making of the said contract, they expended large sums of money in building buildings, and otherwise preparing to put said machines, for which they had so contracted with the defendants, in use in the manufacture of matches; and by reason of the defendants' said defaults plaintiffs lost large sums of money in respect of said buildings and said business, and were greatly delayed, interrupted, and stopped in said business, and lost, by reason of such defaults of defendants, large sums of money and great profits, and the use of such buildings, all of which buildings, business, use of buildings, and profits were in contemplation of both parties as dependent on the defendants' performance of their contract at the time of the making of such contract." The exhibit A referred to and annexed was as follows: —

"ATHOL, MASS., March 1, 1882.

"We, the undersigned, agree to furnish the Penn Match Company, Limited, of Philadelphia, Pennsylvania, one setting and one rolling-off machine at prices named (two hundred dollars, one hundred dollars), cash, f. o. b., on or before April 13, 1882. HAPGOOD AND SMITH."

The second count differed from the first only in asserting that the agreements made by the defendants required them to furnish plaintiffs with four setting-machines and one rolling-machine according "to written memorandum of such contract." The memorandum thus referred to was written underneath the agreement set out in the first count, and was as follows: —

"Accept order in addition to above of four setting and one rolling-off machines, to be furnished as soon as possible thereafter. HAPGOOD AND SMITH."

The third count was also, in substance, like the first, except that it stated an agreement to have been made by defendants under seal, dated March 1, 1882, and signed by them, and purporting to be a contract "to furnish the Penn Match Company, Limited, of Philadelphia, Pennsylvania, for one year from date, three hundred gross of the best quality match-splints per day, or any such quantity as they may order." The complaint was demurred to on the following grounds: "1. Said declaration and the several counts thereof do not set forth any cause of action substantially according to the rules contained in the statutes of the commonwealth relating to pleading; 2. The several contracts in writing set out in said declaration are without mutuality, and never were binding on the defendants." When the case came on for trial in the superior court, it was agreed that the questions raised by the demurrer might be there raised. Kempton, though formerly a partner with the other plaintiffs, withdrew from the firm before this action was begun. The evidence offered tended to show that, in February, 1882, Abbott, Kempton, and Kee agreed to form a limited liability company, under the laws of Pennsylvania, to carry on the manufacture of matches in Philadelphia, under the name of the Penn Match Company, Limited, and to build a factory if they could obtain the machines hereinbefore referred to from the defendants, who only could furnish them. The plaintiffs thereupon applied to the defendants, who entered into the contract in question. The plaintiffs, at the time, stated to defendants their purpose to form a company, and that they would not proceed with its organization, nor cause a factory to be built, unless they could make the contract with the defendants to furnish the machines. The contracts were thereupon signed by the defendants, at their respective dates; but subsequently, by letter of May 24, 1882, the defendants refused to furnish the machines. Afterwards, by an agreement dated October 3, 1883, plaintiffs perfected the organization of the proposed company. A factory was then built for it, and it began to do business. Plaintiffs offered evidence to show the expense incurred and the damages sustained by the company, and also the damages to them as individuals, independent of their membership of the company, resulting from the refusal of the defendants to deliver machines and splints. Defendants, on their part, offered in evidence a judgment in their favor in the case of *Penn Match Co.* v. *Hapgood*, reported in 141 Mass. 145, and thereupon they asked the judge to rule

that there was no evidence to warrant a verdict for the plaintiff; that the contracts were in terms with the Penn Match Company, Limited, and as that company was not organized at the time the contracts were entered into, there was never any contract which could bind that company, and that the plaintiffs cannot recover, and that the judgment offered in evidence by defendants is a bar to this action. The judge refused to rule as requested by the defendants, and declared the law to be that the association, by the agreement of October 3, 1882, is so different from the organization of plaintiffs, as general partners, that, in this case, no damage suffered by the association can be recovered, and that the only damages recoverable are such as the plaintiffs themselves suffered independently of the membership of the association. The case was then reported to this court for its determination. If the rulings were correct, the damages were to be assessed by an assessor. If the demurrer should be sustained on a ground curable by amendment, such amendment should be permitted. If the verdict ought to have been ordered for the defendants, judgment was to be entered for them; but if the plaintiffs were entitled to recover other and further damages, the verdict was to be set aside, and a new trial ordered.

W. S. B. Hopkins, for the plaintiffs.

F. P. Goulding, for the defendants.

KNOWLTON, J. According to the terms of the report in this case, if the demurrer should have been sustained on grounds which could have been removed by amendment, the plaintiffs are to be permitted to amend. The defendants have made no point upon the use of the present tense instead of the past tense in the allegation in the writ as to the partnership of the plaintiffs, and if that is material it may be corrected by amendment. In each count of the declaration, after alleging that there was a valuable consideration for the defendants' contract, the plaintiffs aver that the contract was reduced to writing, and set out as the contract a writing which shows no consideration nor mutuality, but merely an undertaking on one side. To state the contract truly, they should set out in each count their own agreement, which constituted the consideration for the agreement made by the defendants.

The substantive grounds of defense rest upon the rulings and refusals to rule in regard to the effect of the evidence.

There was an attempt to recover under the contracts now before us by a suit brought in the name of the Penn Match Company, Limited, against these defendants. In that case the plaintiff was alleged to be a corporation, and the hearing and decision were upon a demurrer which admitted that allegation to be true. If we assume that the limited partnership organized under the laws of Pennsylvania was so far an entity separate from the persons who were members of it that it could sue and be sued in this commonwealth as a corporation can, it is quite clear that it was not a party to the contracts declared on: *Penn Match Co.* v. *Hapgood*, 141 Mass. 145. If a contract is made in the name and for the benefit of a projected corporation, the corporation after its organization cannot become a party to the contract, even by adoption or ratification of it: *Kelner* v. *Baxter*, L. R. 2 Com. P. 174; *Gunn* v. *London etc. Ins. Co.*, 12 Com. B., N. S., 694; *Melhado* v. *Porto Alegre etc. R'y*, L. R. 9 Com. P. 503; *In re Empress Engineering Co.*, 16 Ch. Div. 125.

Upon the facts reported in the present case, the defendants as well as the plaintiffs must have understood that the limited partnership was only projected, and that the plaintiffs, acting jointly as individuals or as general partners, constituted the only party who could contract with the defendants in the manner proposed. It is evident that both parties intended to enter into binding contracts. As recited in the report, for the purpose of carrying out their agreement to form a limited partnership, "and in the name of and for the benefit of the projected company, the plaintiffs applied to the defendants, who made the contracts in question, and the plaintiffs made known to the defendants that the projected company would proceed with its organization, and would cause a factory to be built for it, only in case they could make a contract with the defendants to furnish the machines."

We are of opinion, in view of the facts known to both parties, that the plaintiffs must be deemed to have been jointly contracting in the only way in which they could lawfully contract, and that they assumed the name Penn Match Company, Limited, as that in which they chose to do business in reference to the projected limited partnership until their organization should be completed, and they should turn over the business to the new company, which would be composed of themselves in a new relation. This seems to be warranted by the language of the report, and entirely consistent with their

purpose made known to the defendants; and in this way only can effect be given to their acts.

The judgment in the former suit is no bar to this action, for that suit was brought by a different plaintiff.

On the subject of damages, the report does not sufficiently state the evidence to enable us fully to determine the rights of the parties. As we understand the rule laid down by the presiding justice, that "the only damages which can be recovered are such as the plaintiffs themselves have suffered independently of their membership of the association," we are of opinion that it is too narrow. In the view which we take of the agreement, the plaintiffs contracted for articles to be delivered to themselves. They informed the defendants that they had agreed to organize a limited partnership, of which they were to be the sole members, and that they made the contracts to enable them profitably to carry on business in their new organization. By reason of the defendants' breach of contract, the plaintiffs were unable to turn over to the new company the property which they should have received for that purpose, and they have been unable to establish that company, and start it in its work under such favorable auspices, and with such an equipment for the transaction of a profitable business, as if the defendants had performed their contracts. The only damages for which the defendants are liable to any one must be recovered in this action; and inasmuch as the machines could not be procured in the market, we are of opinion that the parties must be presumed to have contracted in reference to the declared purpose for which they were to be furnished, and that that purpose may be considered in assessing the damages: *Somers* v. *Wright*, 115 Mass. 292; *Townsend* v. *Nickerson Wharf Co.*, 117 Id. 501; *Manning* v. *Fitch*, 138 Id. 273; *Whitehead and Atherton Machine Co.* v. *Ryder*, 139 Id. 366; *Cory* v. *Thames Ironworks and Shipbuilding Co.*, L. R. 3 Q. B. 181; *Portman* v. *Middleton*, 4 Com. B., N. S., 322; *McHose* v. *Fulmer*, 73 Pa. St. 365.

We do not intimate that the plaintiffs are to receive any damages as members of the limited partnership, but only that the damages which they suffered, if any, by reason of the defendants' preventing them from successfully establishing and fitting out a business to be conducted by them as a limited partnership, may be recovered. The mere fact that they arranged to conduct their business by a limited partnership under the statute of Pennsylvania does not deprive them of the

rights which they then had in the business, nor of the advantages which properly belonged to it. The value of the articles contracted for may be estimated in reference to their intended use in the business for which the defendants were to furnish them.

The plaintiffs are to have leave to amend their writ and declaration as they shall be advised, and the case is to stand for trial.

So ordered.

CORPORATIONS. — A corporation is a legal entity, separate and distinct from the individuals who are its stockholders, and is not affected by the personal rights, obligations, or transactions of its individual stockholders with third persons, whether such rights accrued or obligations were incurred before or after incorporation: *Moore etc. Hdw. Co.* v. *Towers Hdw. Co.*, 87 Ala. 206; 13 Am. St. Rep. 23.

LINDSEY *v.* LEIGHTON.

[150 MASSACHUSETTS, 285.]

LANDLORD, WHO LIABLE AS. — One may be a landlord who is not an owner, and a landlord cannot escape from his obligation as such by showing that he is not an owner of the property. A verdict against one as a landlord of premises, the title to which is in his wife, is sustained by evidence that when applied to by plaintiff, and asked whether he had a tenement to let, he answered "yes," gave plaintiff the key, talked with him about repairs, and afterwards collected rent from him for several months, giving receipts therefor, generally in his own name.

LANDLORD IS ANSWERABLE FOR DEFECTS IN THE PREMISES OF WHICH HE HAS NO ACTUAL KNOWLEDGE, and through which his tenants are injured. The landlord's duty is that of care, and his ignorance is no defense.

TORT for injuries to plaintiff by falling down a flight of steps leading from a tenement leased to him by the defendant. The title to the property was in the defendant's wife. There was testimony tending to show that the plaintiff, in November, 1887, called upon the defendant, and asked him if he had a tenement to let. The defendant answered "yes," and gave plaintiff the key to the tenement, talked with him about repairs, saying he should not do much in that way because he intended to make a change in the building, collected the rents for each month from December, 1887, to October, 1888, nearly always giving receipts therefor in his own name; that after the accident, defendant said if he was to blame he was ready to make it right; that he would see plaintiff again about it.

There was no evidence of any knowledge on the part of the defendant of the defects from which the accident occurred, but the evidence tended to show that the premises were in the same condition as when plaintiff hired them, and that the defendant passed over the premises from time to time when he went to the building to collect rent and for other purposes. The defendant requested the judge to rule that plaintiff was not entitled to maintain the action, because the evidence did not show that defendant was the landlord at the time of the injury; that there was no evidence of any knowledge on the part of defendant of the defects from which the accident occurred; and third, "that the obligation of the landlord to repair common ways and passages has not been extended so far as to require a reconstruction of the ways on a different plan, if the ways as they existed when the premises were hired were not altogether convenient or safe by reason of some fault in the original plan which was apparent." The judge refused to rule as requested, and instructed the jury that the defendant's duty was to use reasonable care to keep the platform and steps in proper condition, and that he would be liable for the want of such care, although he had no knowledge of the defect, if the injuries of the plaintiff were occasioned solely by the defendant's failure to use reasonable care to keep the steps in proper condition. Verdict for plaintiff.

J. W. Corcoran and H. Parker, and C. C. Felton, for the plaintiff.

J. Smith, for the defendant.

C. ALLEN, J. 1. It was a question of fact whether the relation of landlord and tenant existed between the parties. The actual ownership of the premises is only one element to be considered in determining this question. One may be a landlord who is not the owner. The tenant cannot escape from his obligations by showing that his landlord had no legal title; nor can the landlord escape from his obligations by showing the same thing. The obligations of the tenant to his landlord, and of the landlord to his tenant, are reciprocal; and they depend upon the existence of that relation, and not upon the validity of the landlord's title And the same rule is applicable in case of a tenancy at will: *Cobb* v. *Arnold,* 8 Met. 398, 402; *Hilbourn* v. *Fogg,* 99 Mass. 11; *Holbrook* v. *Young,* 108 Id. 83, 85. The court properly refused to rule that there was

no evidence from which the jury would be authorized to find that the defendant was the landlord of the plaintiff. The evidence tended to show that the defendant assumed to be the owner of the premises, and conducted himself as such, both before and after the accident, and assumed the position of landlord, and as such contracted with the plaintiff.

2. It was not necessary to show that the defendant had actual knowledge of the defect. His duty was that of due care; and ignorance of the defect was no defense: *Gill* v. *Middleton*, 105 Mass. 477; 7 Am. Rep. 548. See also *Readman* v. *Conway*, 126 Mass. 374; *Looney* v. *McLean*, 129 Id. 33; 37 Am. Rep. 295; *Watkins* v. *Goodall*, 138 Mass. 533.

3. There was no occasion to give the third instruction asked for, since there was no question in the case which involved the necessity of a reconstruction of the platform on a different plan. The plaintiff did not complain of the plan of construction, but of the looseness of a board or plank.

Exceptions overruled.

LANDLORD AND TENANT. — As to the liability of a lessor to his tenant for nuisances or injuries from a failure to repair the leased premises: Note to *City of Lowell* v. *Spaulding*, 50 Am. Dec. 776–779; note to *Godley* v. *Hagerty*, 59 Id. 733, 734; *Carson* v. *Godley*, 26 Pa. St. 111; 67 Am. Dec. 404. A landlord leasing upper stories of his building for business purposes, representing them to be sufficiently strong for that use, but knowing them to be otherwise, is liable for injuries to tenants, to whom he subsequently lets the lower stories, received from an overloading of the upper floors by the upper tenant: *Brunswick-Balke-Collender Co.* v. *Rees*, 69 Wis. 442. So the landlord dividing his building into several tenements, and retaining control of the halls and stairways for the common use of all the tenants, is liable for injuries sustained by reason of defects in such halls and stairways, though he is not responsible for defects which do not render the halls and stairways reasonably unfit for use, or which reasonable care and skill would not prevent: *Gillvon* v. *Reilly*, 50 N. J. L. 26; nor is a landlord of business property responsible to his tenant's servant for personal injuries resulting from a defective stairway upon the premises used in connection with the business of the tenant, unless the lease expressly covenants that the landlord should make such repairs, the neglect to make which caused the defect complained of: *Willson* v. *Treadwell*, 81 Cal. 58.

McMahon *v.* Gray.

[150 Massachusetts, 289.]

Execution, What Subject to. — Widow's Right to have Dower Assigned to her out of the lands of her deceased husband is not subject to an execution at law.

Creditor's Bill, What Subject to. — Widow's Right to have Dower Assigned to Her may be subjected to the payment of her debts by a proceeding in equity, by which a receiver may be appointed with authority to proceed in her name to have such dower assigned to her, and to receive the rents and profits thereof.

Bill in equity praying that the interest and right of the defendant to have dower assigned to her out of the estate of her deceased husband be applied in payment of plaintiffs' debt; that a receiver be appointed with authority to proceed in the defendant's name to have such dower assigned her, and to receive the rents and profits thereof, and that she be enjoined from conveying or disposing of her right and interest. The bill was demurred to for want of equity, on the ground that the plaintiffs had an adequate remedy at law. The demurrer was sustained, bill dismissed, and plaintiffs appealed.

F. A. Gaskill and W. Thayer, for the plaintiffs.

J. H. Bancroft, for the defendant.

Field, J. We think it clear that the right of the defendant to have dower assigned to her out of the lands of her deceased husband cannot be attached or taken on execution in an action at law. The statutes relating to dower have not made a dowress a tenant in common with others in the lands of her deceased husband. The statutes which in some cases give to a widow, in lieu of dower, an estate for her life in one half of the lands of which her husband died seised in fee, or which give to her an estate in fee in such lands to an amount not exceeding five thousand dollars, have been held to be modifications of the statutes of descent, and to vest the title to these estates in the widow immediately on the death of her husband: *Sears* v. *Sears*, 121 Mass. 267; *Lavery* v. *Egan*, 143 Id. 389. But, as was said in *Sears* v. *Sears*, *supra:* "The title thus vested in the widow wholly differs from a mere right of dower, which extends to all lands owned by the husband at any time during the coverture, and confers no seisin until it has been assigned to her." Before the dower is assigned, the widow has no legal estate in the land upon which an execu-

tion can be levied: *Gooch* v. *Atkins*, 14 Mass. 378; *Hildreth* v. *Thompson*, 16 Id. 191; *Croade* v. *Ingraham*, 13 Pick. 33.

At common law, a dowress could not enter until her dower had been assigned. After dower had been assigned, and she had entered into possession, she became immediately seised for her life of a freehold estate, with the usual incidents of such an estate, and she could convey it, and it could be taken on execution by her creditors: *Windham* v. *Portland*, 4 Mass. 384, 388; *Sheafe* v. *O'Neil*, 9 Id. 13.

It is manifest that the reason of the common-law rule that a widow cannot convey to another her right to have dower assigned, or enter upon the land before the assignment, as well as of the rule that her right cannot be taken on execution, was not founded upon any policy of the law that dower should be a provision for her support, which should be exempt from liability to be taken by her creditors, because she could not enjoy her dower until it was assigned, and then it at once became alienable by her, and liable to be taken on execution to satisfy judgments obtained against her.

The right to have dower assigned is a valuable right to property, and in the present case it is a right to land within this commonwealth, which the dowress can have set off to her whenever she chooses, by legal process, if necessary. By the weight of authority, it is a right which in equity she can assign to another, and courts of law will recognize the assignment to the extent of enabling the assignee to maintain a writ of dower in her name: *Lamar* v. *Scott*, 4 Rich. 516; *Robie* v. *Flanders*, 33 N. H. 524; *Potter* v. *Everitt*, 7 Ired. Eq. 152; *Tompkins* v. *Fonda*, 4 Paige, 448; *Strong* v. *Clem*, 12 Ind. 37; 74 Am. Dec. 200; *Payne* v. *Becker*, 87 N. Y. 153; *Pope* v. *Mead*, 99 Id. 201; *Davison* v. *Whittlesey*, 1 McAr. 163.

The facts that the lands described in the bill are lands of which her husband died seised, and that she is in occupation, and may continue in occupation under the Public Statutes, chapter 124, section 13, without having her dower assigned, if the heirs or devisees do not object, do not change the essential nature of her right. This provision of the statutes was undoubtedly enacted for her benefit, but we are unable to see any indications that it was enacted for the purpose of exempting her right of dower from being taken to satisfy her debts. She continues to have the same right and power to compel an assignment of dower that a dowress had before the statute of 1816, chapter 84, was enacted. See R. S., c. 60, sec. 6, and

commissioners' note; Gen. Stats., c. 90, sec. 7; Pub. Stats., c. 124, sec. 13.

As this right is a valuable interest in property within the commonwealth, which is assignable in equity, we are of opinion that it can be reached by creditors, under the Public Statutes, chapter 151, section 2, clause 11, as amended by the statute of 1884, chapter 285. Suits similar to this, under statutes resembling ours, have been maintained elsewhere, and the means whereby the land has been applied to the payment of the plaintiff's debt seem to be within the ordinary powers of a court of equity: *Payne* v. *Becker*, 87 N. Y. 153; *Tompkins* v. *Fonda*, 4 Paige, 448; *Davison* v. *Whittlesey*, 1 McAr. 163; *Boltz* v. *Stoltz*, 41 Ohio St. 540.

In *Mason* v. *Mason*, 140 Mass. 63, the conveyance was of an inchoate right of dower by a married woman in the lifetime of her husband. *Maxon* v. *Gray*, 14 R. I. 641, was decided on the ground that there were no statutes of Rhode Island which gave the court jurisdiction, and that the case was not within the general equity jurisdiction of the court. The decree dismissing the bill must be reversed, and the demurrer overruled.

So ordered.

RIGHT OF DOWER UNTIL ASSIGNED is a mere chose in action, and not subject to execution: *Carnall* v. *Wilson*, 21 Ark. 62; 76 Am. Dec. 351; nor is an unassigned dower subject to attachment: *Rausch* v. *Moore*, 48 Iowa, 611; 30 Am. Rep. 412.

SHORT *v.* SYMMES.

[150 MASSACHUSETTS, 298.]

OFFICER DE FACTO. — ONE SUED FOR INTERFERING WITH THE PERSON OR PROPERTY OF ANOTHER, and attempting to justify on the ground that his act was properly done by him as a public officer, must show, not merely that he was an officer *de facto*, but that he was duly and regularly qualified to act as such officer.

OFFICER DE FACTO. — ONE MAKING AN ARREST AS A POLICE-OFFICER MUST, WHEN SUED FOR ASSAULT AND FALSE IMPRISONMENT, prove his legal qualifications as such officer, or that he publicly acted and was recognized as such officer before or after act brought in question.

ACTION for assault and false imprisonment. The defendant justified on the ground that he was a police-officer, and as such arrested the plaintiff for drunkenness. The evidence showed that the defendant arrested plaintiff, saying to him at

the time, "I am an officer; I arrest you for disturbing a religious meeting and for drunkenness," and that after such arrest the plaintiff was tried, convicted, and sentenced for the crime for which he was arrested, and that the warrant under which the arrest was made had a return thereon, signed by the defendant as a police-officer. There was no other evidence concerning defendant's official position whatever, or that he had ever acted as such officer except in making the arrest in question. The judge thereupon ruled, at the instance of the plaintiff, that there was no evidence to justify a jury in finding that the defendant was a police-officer. Verdict for the plaintiff.

W. S. B. Hopkins, for the defendant.

J. W. Corcoran, for the plaintiff.

C. ALLEN, J. If one who has assumed to interfere with the person or property of another is sued therefor, and attempts to justify his act on the ground that it was properly done by him as a public officer, it is for him to show, not merely that he was an officer *de facto*, but that he was duly and legally qualified to act as such officer. This has been intimated heretofore by this court in cases where the question was not directly presented: *Fowler* v. *Bebee*, 9 Mass. 231, 235; 6 Am. Dec. 62; *Petersilea* v. *Stone*, 119 Mass. 465, 468; 20 Am. Rep. 335; *Sheehan's Case*, 122 Mass. 445, 446; 23 Am. Rep. 374; and the doctrine is supported by a great weight of authority: *Pooler* v. *Reed*, 73 Me. 129; *Stubbs* v. *Lee*, 64 Id. 195; 18 Am. Rep. 251; *Brewster* v. *Hyde*, 7 N. H. 206; *Blake* v. *Sturtevant*, 12 Id. 567, 572; *Cummings* v. *Clark*, 15 Vt. 653; *People* v. *Nostrand*, 46 N. Y. 375, 382; *Green* v. *Burke*, 23 Wend. 490, 503, 504; *People* v. *Hopson*, 1 Denio, 574; *People* v. *Weber*, 86 Ill. 283; *People* v. *Weber*, 89 Id. 347; *Gourley* v. *Hankins*, 2 Iowa, 75; *State* v. *Dierberger*, 90 Mo. 369; *Venable* v. *Curd*, 2 Head, 582; *Miller* v. *Callaway*, 32 Ark. 666. In like manner, when one sues to recover fees due to him as an officer, he must show that he is an officer *de jure: Dolliver* v. *Parks*, 136 Mass. 499; *Phelon* v. *Granville*, 140 Id. 386.

But it is urged that an officer *de facto* is *prima facie* an officer *de jure*, and that where the facts relating to the appointment to office do not fully appear, an inference of its validity may be drawn from proof of his having acted as such. However this may be in a case where the party seeking to justify his act produces evidence that he publicly acted and was recognized as an officer in other instances, before or even after

the act which is brought into question, it certainly is not sufficient for him to show merely that he assumed to act as an officer in doing the very thing which he seeks to justify, or in other proceedings which are only incidental thereto. If that were so, his authority to do the act might be inferred simply from his having assumed to do it: *State* v. *Wilson*, 7 N. H. 543; *Hall* v. *Manchester*, 39 Id. 295; *Goulding* v. *Clark*, 34 Id. 148; *Wilcox* v. *Smith*, 5 Wend. 231; 21 Am. Dec. 213; *State* v. *Carroll*, 38 Conn. 449; 9 Am. Rep. 409; 1 Greenl. Ev., secs. 83, 92. In the present case, there was no evidence sufficient to warrant a finding that the defendant was a police-officer.

Exceptions overruled.

THE ACTS OF AN OFFICER DE FACTO, though from considerations of public policy they are valid and binding as to the public and third persons, are invalid as to themselves: Note to *Hildreth* v. *McIntire*, 19 Am. Dec. 68, 69; *Hamlin* v. *Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176. When an officer sets up his title to an office in justification of his official act, for which an action is brought, he must prove his legal title to the office; and it is not sufficient that he shows he was an officer *de facto*: *Grace* v. *Teague*, 81 Me. 559.

WILLIAMS *v.* SPENCER.

[150 MASSACHUSETTS, 346.]

WILL. — OPINIONS OF THE ATTESTING WITNESSES OF A WILL RESPECTING THE SANITY OF THE TESTATOR, formed at the time, are competent evidence; but it is otherwise with their opinions formed either before or afterwards.

APPEAL from decree of the probate court admitting to probate the will of Polly Crosby.

F. P. Goulding and J. M. Cochran, for the appellants.

W. S. B. Hopkins and H. J. Clarke, for the appellee.

KNOWLTON, J. How far the opinion of witnesses as to the mental condition of a testator may be received in evidence in proceedings to establish the validity of a will, is a question about which there is a great conflict of authority. In this commonwealth, and in the courts of common law in England and in many of the states of this country, it is held that an ordinary witness cannot give a mere opinion, whatever opportunities of observation he may have had. On the other hand, in the ecclesiastical courts of England, and in many courts in the United States, all witnesses have been permitted to give.

not only facts upon which an opinion may properly be formed, but their opinions founded on those facts. It is universally held that an attesting witness may give his opinion, formed at the time, as to the sanity or insanity of the testator when the will was executed. In those courts where opinions are admitted on the ground that conclusions in regard to the mental condition of another, formed by one who has had an opportunity of observing him, are, in themselves, valuable and unobjectionable as evidence, there may be good reasons for holding that the final opinion of the witness at the time of the trial should be received. But where a different doctrine is held, the opinions of attesting witnesses to a will stand upon a peculiar ground. The witnesses are chosen by the testator, and are thereby, under the law, charged with an important duty in relation to the execution and proof of the will. It may be presumed that, in the performance of that duty, they will observe carefully the appearance of the testator at the time, and form an opinion as to his sanity. That opinion, naturally and properly, may determine their action in signing or refusing to sign as witnesses. It is regarded as a fact of some significance, which enters into the transaction, and which the court should be permitted to know and consider, like any other fact touching the execution of the instrument. Upon this theory, the opinion of an attesting witness, formed at another time, before or after the execution of the will, should stand like that of any other witness. It might be competent in cross-examination to affect the value of his testimony as to his conclusion at the time of attestation, but it could not be received on account of the value to be attached to it as a mere opinion.

In *Poole* v. *Richardson*, 3 Mass. 330, the court permitted the witnesses to give "the judgment they formed of the soundness of the testator's mind at the time of executing the will." In *Robinson* v. *Adams*, 62 Me. 369, 409; 16 Am. Rep. 473, referring to the time of execution of a will, the court say: "It is the opinion then formed that is admissible." In *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681, it is said of the facts testified to by the witnesses, which occurred at the time of attesting, that "it is legitimate to give them such additional weight as may be derived from the conviction they produced at the time." The rule is stated to be, that subscribing "witnesses are permitted to testify as to the opinion they formed of the testator's capacity, at the time of executing his will":

1 Jarman on Wills, 4th Am. ed., 76. Redfield says: "It is admitted in nearly all the cases that the subscribing witnesses to the will are competent to express an opinion of the testator's apparent sanity at the time of execution": 1 Redfield on Wills, 4th ed., 140. The only case to which we have been referred, which decides that a subscribing witness may give an opinion formed afterward, is *Runyan* v. *Price*, 15 Ohio St. 1; 86 Am. Dec. 459; and in Ohio, all witnesses who have had an opportunity of observing a testator are permitted to give their opinions, founded on what they have seen.

We are of opinion that, under the authorities in this commonwealth, the testimony of the attesting witness was rightly excluded.

Whether the declaration of the witness Upham, offered to contradict him, should have been received, depends upon whether it was inconsistent with his former testimony. If it be assumed that the expression "fit to make a will" referred to the mental condition of the testatrix, and that it is generally known that a person of full age and sound mind is fit to make a will, and if we disregard the differences of opinion that may be presumed to exist as to what constitutes soundness of mind or fitness to make a will, we cannot say that the declaration was contradictory to the previous testimony. It may or may not have been, according as the facts not reported were of one kind or of another.

The witness "gave accounts of several conversations and acts tending to show soundness of mind." That certain facts indicating that the testatrix was of sound mind could be shown by his testimony did not necessarily imply that he believed her to be sane. We do not know the full significance of those acts and conversations, and other facts within his knowledge may have shown that she was insane. Upon this ground, the case of *Hubbell* v. *Bissell*, 2 Allen, 196, is an authority in favor of the ruling. Nor upon the facts reported can we say that his testimony that "he never saw any change in her intelligence, coherence of speech, or memory" while she was at his house, after the death of her husband, proves that he believed her to be fit to make a will. So far as the bill of exceptions shows, and so far as we have information from any source, she may have been all her life of such mental capacity and condition as to make it doubtful whether she was ever of sound mind, and the witness may have always considered her unfit to make a will.

The unreported facts of the case may have been such as to make the evidence competent. If the testimony had been received, and the appellee had excepted, we should have assumed on this bill of exceptions that they were so. But against the excepting party, who must establish the error on which he relies, we must assume that they were not.

Exceptions overruled.

WILLS — WITNESSES. — Subscribing witnesses to a will may testify to the opinion formed of the testator's mind at the time of the execution of the will; for the law places them around the testator to try, judge, and determine whether the capacity to make a will exists in him at the time he purports to make one: *Potts* v. *House*, 6 Ga. 324; 50 Am. Dec. 329.

MURRAY *v.* ROBERTS.

[150 MASSACHUSETTS, 353.]

INSOLVENCY PROCEEDINGS. — FOREIGN CREDITOR WHO ACCEPTS THE BENEFIT OF A DIVIDEND resulting from an offer of composition of an insolvent debtor with his creditors made in insolvency proceedings, authorized by the statute of Massachusetts, is bound by a discharge of such debtor subsequently granted in such proceedings, because, by such acceptance, he waives his right to object that the legislature of that state had no constitutional right to pass the statute discharging the debt.

INSOLVENCY STATUTE, CONSTRUCTION OF — DISCHARGE, WHAT DEBTS INCLUDED IN. — Where a statute authorizes the discharge of an insolvent debtor from all debts, which have been or shall be proved against his estate, a debt must be regarded as proved, and therefore affected by his subsequent discharge, if the holder thereof knowingly accepts a dividend resulting from the composition of such debtor with his creditors pursuant to an offer made by the debtor in such proceeding.

ACTION to recover a balance alleged to be due for goods sold by the plaintiffs to the defendant. The defense consisted of a discharge in insolvency proceedings. The defendant had filed in a court of insolvency a proper schedule of his property and creditors, in which appeared the names, residence, and debts of the plaintiffs. Defendant then filed a proposal for a composition with his creditors. The plaintiffs were notified of the insolvency, and of the offer of composition. The court of insolvency made a decree confirming the composition proceedings, and ordered the defendant to deposit in court the amount to carry them out, and directed, upon his doing so, a dividend should be ordered for the creditors. Afterwards, on November 16, 1886, defendant was granted his discharge. December 6, 1886, plaintiffs wrote to the register of insolvency requesting

him to remit them the amount of the dividend. This he declined to do until they signed a receipt as follows:—

"PROVIDENCE, R. I., December 6, 1886.

"Received of F. W. Southwick, register of probate and insolvency, $43 dividend, in matter of composition case of Peter Roberts, insolvent debtor. Claim, $215. Dividend, 20 per cent, $43."

This receipt was signed by plaintiff and returned to the register on December 7th of the same year, and he thereupon sent them a check for the amount.

W. A. Gile and A. M. Taft, for the plaintiffs.

W. W. Rice, W. H. King, and H. W. Rice, for the defendant.

KNOWLTON, J. It has repeatedly been decided that a resident of another state who voluntarily submits himself to the jurisdiction of a court of insolvency, by proving his claim, or otherwise participating in the proceedings, waives his right to object that the legislature of the state which created the court has no constitutional right to pass a statute which will discharge his debt: *Clay* v. *Smith*, 3 Pet. 411; *Journeay* v. *Gardner*, 11 Cush. 355; *Eustis* v. *Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327.

The plaintiffs were duly notified of the pendency of insolvency proceedings against the defendant in this commonwealth, and of his proposal of composition with his creditors, and of the order of a dividend on the offer of composition, and they wrote to the register of insolvency requesting him to remit the amount of their dividend. On his refusal to send it without having their receipt for it, they sent him a receipt which expressly acknowledged that they received the amount as a "dividend in matter of composition, case of Peter Roberts, insolvent debtor." This was a recognition by the plaintiffs of the insolvency proceedings, and a ratification of them, and submission to them, so far as they purported to make the plaintiffs parties entitled to share in the distribution of assets. The case is brought within the principle laid down in *Eustis* v. *Bolles*, *supra*. The plaintiffs could not avail themselves of the advantages resulting from the proceedings in insolvency without submitting themselves to the consequences which the law imposes on such creditors. If, therefore, by the terms of our statute, their debt is discharged, the statute is as binding upon them as if they had been residents of this commonwealth.

It is argued that a discharge in insolvency does not in terms affect foreign creditors, unless they have proved their claims, even though, under the statutes of 1884, chapter 236, they have participated in the proceedings, and have accepted a dividend; and it is said that the plaintiffs did not prove their claim. The language of the discharge covers all "debts which have been or shall be proved" against the debtor's estate, thus including debts proved after the discharge is granted: Pub. Stats., c. 157, sec. 80. Until the passage of the statute of 1884, chapter 236, none but creditors who had proved their claims could receive a dividend, and a claim was said to be proved only when it had been allowed by the court, upon presentation supported by affidavit in the form required. It is only in that sense that the word "proved" is now used in most parts of the statute. But the question arises whether, in the application of sections 80 and 81 of the Public Statutes, chapter 157, to a case like the present, it is not used in a broader sense. In construing the discharge, can the claim of the plaintiffs be said to have been proved against the defendant's estate? That was done which obtained for them a dividend from the estate. The presentation of their claim by the defendant in his schedule, and their acceptance of the benefits accruing under the statute of 1884, chapter 236, was equivalent in its results to a formal proof of their claim under the former statute. To hold that their claim was not proved, would be to permit foreign creditors to have all the advantages open to creditors residing in our own state, without making them liable to have their debts discharged. It seems to us that when the defendant, under the statute of 1884, chapter 236, presented to the court a schedule of his creditors, containing the names and residence of the plaintiffs and the amount of their debt, and when, under the law, they were notified of all the proceedings looking to a composition with the creditors, and to a discharge of the defendant, and when the schedule was treated by the court as a sufficient verification of their debt to warrant a dividend upon it, and when the dividend was made and deposited in the registry of the court for the plaintiffs, and they were notified of it, and when they afterwards, knowing all that had been done, availed themselves of the proceedings and accepted the dividend, their debt must be deemed to have been proved within the meaning of sections 80 and 81 of the Public Statutes, chapter 157. Such a construction of these sections is in accordance with the true spirit and intent of the law, and

gives this part of the statute a proper application to facts which could not exist under the law in force at the time it was enacted.

On the facts agreed, the plaintiffs' debt is barred by the discharge in insolvency.

Judgment affirmed.

THE PRINCIPAL CASE decides an important question of constitutional law, upon which there is much conflict among the authorities. For convenience, the discussion will be divided into three heads, as follows: 1. Is a decree of discharge void when rendered, as against a non-resident creditor, who is not a party to the insolvency proceedings? 2. If so, upon what ground? 3. If void when rendered, does such non-resident creditor, by accepting the dividend decreed, waive or otherwise lose his constitutional right to impeach the decree of discharge, and to receive the full amount originally due him, by maintaining an action to recover the unpaid balance of his demand?

1. The cases are practically unanimous in holding that a decree of discharge in insolvency is void when rendered, as against a non-resident creditor, who has not made himself a voluntary and consenting party to the proceedings: *Felch* v. *Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Norton* v. *Cook*, 9 Conn. 314, 321; note to *Peck* v. *Hibbard*, 62 Am. Dec. 611–613; *McCarty* v. *Gibson*, 5 Gratt. 307; *Collins* v. *Rodolph*, 3 G. Greene, 299, 305. The constitution of the United States gives him the right to impeach the discharge in any state or federal court, and to recover a judgment for the whole of his demand: *Ogden* v. *Saunders*, 12 Wheat. 213; *Shaw* v. *Robbins*, 12 Id. 369, note; *Boyle* v. *Zacharie*, 6 Pet. 635; *Baldwin* v. *Hale*, 1 Wall. 223; *Denny* v. *Bennett*, 128 U. S. 489; *Kelley* v. *Drury*, 9 Allen, 27; *Murphy* v. *Manning*, 134 Mass. 488; *Whitney* v. *Whiting*, 35 N. H. 457; *Donnelly* v. *Corbett*, 7 N. Y. 500; *Poe* v. *Duck*, 5 Md. 1.

It should be carefully borne in mind that this is a contest between creditor and debtor, and is not a contest between creditors, nor between a non-resident creditor and the assignee in insolvency. It is settled that when a non-resident creditor attaches property after the debtor's assignment, the assignee has the better title, and the creditor cannot take it from him, even on a writ from a federal court, or from a court of the creditor's state, provided the property was subject to the jurisdiction of the insolvency court at the time of the assignment: *Geilinger* v. *Phillippi*, 133 U. S. 246; *Crapo* v. *Kelly*, 16 Wall. 610; *Torrens* v. *Hammond*, 10 Fed. Rep. 900.

2. The recent cases in the supreme court of the United States seem to establish conclusively that the true ground upon which such a discharge is void as against the non-resident creditor is, that the insolvency court has no jurisdiction over the cause: *Gilman* v. *Lockwood*, 4 Wall. 409; *Denny* v. *Bennett*, 128 U. S. 489; *Crapo* v. *Kelly*, 16 Wall. 610. This is clearly pointed out in the latest case on the subject. In *Denny* v. *Bennett*, 128 U. S. 489, 497, 498, the court says: "One of the best statements of the doctrine is found in the following language, used in the latest case on the subject, — that of *Gilman* v. *Lockwood*, 4 Wall. 409: 'State legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself is so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of

an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one state cannot discharge the contracts of citizens of other states, because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction of the cause.' This is conceived to be a clear and accurate presentation of the doctrine of the preceding cases, and it will be seen that the substance of the restrictive principle goes no further than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another state than that where the court is sitting, who does not appear and take part, or is not otherwise brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another state, who is not personally subjected to the jurisdiction of the court": *Denny* v. *Bennett*, 128 U. S. 497, 498, per Miller, J. See also *Cole* v. *Cunningham*, 133 Id. 107, 115; *Murphy* v. *Manning*, 134 Mass. 488; *Pratt* v. *Chase*, 44 N. Y. 597; *Hawley* v. *Hunt*, 27 Iowa, 303; 1 Am. Rep. 273.

So if the non-resident creditor appears in the insolvency proceedings merely for the purpose of opposing the discharge, the insolvency court does not acquire jurisdiction to discharge his debt, and he can subsequently recover a judgment for the whole of his demand, notwithstanding the debtor's discharge. By such conduct he does not waive his extraterritorial immunity, nor confer jurisdiction upon the court by consent, because his act shows that he does not consent: *Norton* v. *Cook*, 9 Conn. 314; 23 Am. Dec. 342, and note; *McCarty* v. *Gibson*, 5 Gratt. 307; *Collins* v. *Rodolph*, 3 G. Greene, 299; *Phillips* v. *Allan*, 8 Barn. & C. 477. A party does not waive a jurisdictional objection by appearing to present his objection: *Harkness* v. *Hyde*, 98 U. S. 476; *Walling* v. *Beers*, 120 Mass. 548. As the insolvency court has no jurisdiction over the debtor's property in another state or country, its assignment will not pass title to such property as against a subsequent attachment made by a non-resident of the debtor's state, who has not made himself a party to the insolvency proceedings: *Felch* v. *Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Blake* v. *Williams*, 6 Pick. 286; 17 Am. Dec. 372; *Beer* v. *Hooper*, 32 Miss. 246; *Towne* v. *Smith*, 1 Wood. & M. 137; *The Watchman*, 1 Ware, 232; *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518; *Rhawn* v. *Pearce*, 110 Ill. 350; 51 Am. Rep. 691; *Paine* v. *Lester*, 44 Conn. 196; 26 Am. Rep. 442. But a resident creditor may be restrained by his own state courts from prosecuting an attachment suit in another state against his insolvent debtor; for this is an evasion of the laws of his own state: *Cole* v. *Cunningham*, 133 U. S. 107; *Cunningham* v. *Butler*, 142 Mass. 47. Conversely, if the insolvency court has jurisdiction, the constitution and the act of 1790 give its decree the same force and effect in the federal courts and in the courts of other states which it has by law and usage at home. If its decree be conclusive in the state where it is pronounced, it is equally conclusive everywhere in the courts of the United States: for insolvency decrees stand upon the same footing in this respect as other decrees or judgments rendered with jurisdiction. *Crapo* v. *Kelly*, 16 Wall. 610, is an authority directly in point. There a resident of Massachu-

setts went into insolvency in that state, and the proper court assigned all his property to Crapo. At the time of the assignment, a ship, which was the subject-matter of the contest in *Crapo* v. *Kelly*, *supra*, was on the Pacific Ocean, and afterwards sailed into the port of New York, where it was attached by Kelly, on a writ of a New York creditor, before Crapo took possession of it. The New York court of appeals held that the New York attaching creditor had the prior right to the ship, and gave judgment for Kelly. But the supreme court of the United States reversed that judgment, on the grounds that the ship was subject to the jurisdiction of the insolvency court at the time of the assignment; that the effect of the decree in Massachusetts was to pass title to the assignee, Crapo; and that the constitution gave the decree the same force and effect in New York that it had in Massachusetts. Two justices dissented, on the ground that the insolvency court did not have jurisdiction of the ship, by reason of its absence, and therefore the assignment was not entitled to the same force and effect in New York which it had in Massachusetts. See also *Geilinger* v. *Philippi*, 133 U. S. 246.

In accordance with this principle, it has been decided that a non-resident creditor who proves his debt, without claiming his exemption from the operation of the discharge, or who unites with other creditors in recommending a trustee or assignee, is bound by the discharge to the same extent as resident creditors, and cannot maintain a subsequent action on his demand, even if he has not accepted a dividend: *Clay* v. *Smith*, 3 Pet. 411; *Blackman* v. *Green*, 24 Vt. 17, 21; *Jones* v. *Horsey*, 4 Md. 306; 59 Am. Dec. 81; *Journeay* v. *Gardner*, 11 Cush. 355; *Baldwin* v. *Hale*, 1 Wall. 223. The fact, however, that the non-resident creditor accepts a dividend after the decree of discharge may possibly estop him from contesting such discharge, but cannot confer jurisdiction upon the insolvency court, nor validate a void judgment or decree; for "the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently": Per Mr. Justice Field, in *Pennoyer* v. *Neff*, 95 U. S. 714, 728. . It was accordingly held in *Pennoyer* v. *Neff*, *supra*, that the fact that a non-resident's land was seized on execution, and sold to satisfy a judgment by default on substituted service, was not sufficient to confer jurisdiction upon a state court, although it acted in pursuance of a state statute; that the state statute was contrary to "due process of law" and the Fourteenth Amendment; and that the judgment was void when rendered, and did not become valid by the subsequent seizure of the land on execution.

In other words, a state statute which purports to allow a common-law court to render a money judgment against a non-resident without jurisdiction over his person or over his property, is contrary to "due process of law," and in violation of the Fourteenth Amendment to the constitution of the United States; and a judgment so rendered is void, and may be impeached collaterally in any court, even in the local state courts: *Freeman* v. *Alderson*, 119 U. S. 185; *Eliot* v. *McCormick*, 144 Mass. 10; *Thayer* v. *Needham*, 147 Id. 536; *Eastman* v. *Dearborn*, 63 N. H. 364. It necessarily follows from these cases that the states have not conclusive power to determine what formalities of service of process, etc., shall subject non-residents to the jurisdiction of the local state courts. This power of the states is now restrained and limited by the Fourteenth Amendment. It follows from *Pennoyer* v. *Neff*, 95 U. S. 714, 728, that the *dicta* in several cases, to the effect that a non-resident creditor who accepts a dividend after a decree of discharge thereby subjects himself to the court's jurisdiction and is bound by the discharge, are erro-

neous: *Pratt* v. *Chase*, 44 N. Y. 597; 4 Am. Rep. 718; *Hawley* v. *Hunt*, 27 Iowa, 303; 1 Am. Rep. 273. Under most, if not all, insolvent laws, a creditor must prove his claim before the decree, to entitle him to a dividend. Upon this supposition, these *dicta* are correct; for they then presuppose that the non-resident has willingly proved his claim, and thereby made himself a party to the proceedings, by admitting the essential jurisdictional fact of residence. The close analogy between a state statute of the above character, and a state insolvent statute which purports to allow an insolvency court to render a decree of discharge against non-resident creditors without jurisdiction over their persons or over their debts, leads to the belief that the true ground upon which state insolvent laws are unconstitutional and void, as against posterior contracts held by non-resident creditors, is, that they are contrary to "due process of law," and not that they impair the obligation of contracts. This view was announced by the supreme court of Oregon in a well-reasoned opinion, delivered by Mr. Justice Lord, in *Main* v. *Messner*, 17 Or. 78. The defendant relied upon a discharge in insolvency granted by a proper court in Oregon. The plaintiff was a non-resident creditor, and had not made himself a party to the insolvency proceedings. Lord, J., said: "There being neither jurisdiction of him [the non-resident creditor] or his debt, the decree is a mere nullity so far as it professes to discharge his debt. To hold otherwise would be to condemn him unheard, and to appropriate his property 'without due process of law.' This being so, the question in such cases — the discharge of the insolvent being otherwise valid — is simply one of jurisdiction, and the form in which the remedy is sought cannot affect the principle or alter the rule". Id. 84. This view is entirely consistent with all the recent decisions in the United States supreme court; and the view that "impairing the obligation of contracts" is the true ground, seems to have received its death-blow: *Denny* v. *Bennett*, 128 U. S. 489; *Donnelly* v. *Corbett*, 7 N. Y. 500, 505, 506; *Orr* v. *Lisso*, 33 La. Ann. 476; *Ogden* v. *Saunders*, reviewed in 27 Am. Law Reg. 611.

3. Assuming that the previous discussion has established satisfactorily that a decree of an insolvency court which, in pursuance of a state statute, purports to discharge a debt due to a non-resident creditor who has not made himself a consenting party to the proceedings is void for want of jurisdiction, the only remaining question is, Does such a non-resident creditor, by accepting the amount of the dividend decreed, waive or otherwise lose his constitutional right to impeach the decree, and to recover the unpaid balance of his debt? If he does not accept the dividend, it is conceded that he can recover a judgment for the whole of his debt. The constitution saves his debt from the operation of the discharge, and gives him the right to impeach the decree collaterally, even in the local state courts: *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223; *Kelley* v. *Drury*, 9 Allen, 27; *Guernsey* v. *Wood*, 130 Mass. 503. Does the fact that he has accepted part of his debt, in accordance with a void decree, preclude him from recovering a judgment against the debtor for the unpaid balance? The authorities are infrequent and conflicting upon this point, and even those in the same state are sometimes contradictory. They may be classified as follows: affirmative, *Van Hook* v. *Whitlock*, 26 Wend. 43; *Pratt* v. *Chase*, 44 N. Y. 597; 4 Am. Rep. 718 (*dictum*); *Hawley* v. *Hunt*, 27 Iowa, 303; 1 Am. Rep. 273 (*dictum*); *Eustis* v. *Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327; *Folger* v. *Clark*, 80 Me. 237; negative, *Kimberly* v. *Ely*, 6 Pick. 440; *Woodbridge* v. *Wright*, 3 Conn. 523.

If the non-resident creditor be precluded, by accepting a dividend, from

recovering the unpaid balance, it must be upon the ground of estoppel: (*a*) an estoppel by record; or (*b*) an estoppel *in pais*.

(*a.*) It is not an estoppel by record, because the non-resident creditor is neither a party nor a privy to the record. He does not voluntarily appear in the proceedings; and publication and written notice served upon him outside of the debtor's state cannot make him a party to the record so as to bind him by the decree, even if this be done in pursuance of a local statute, because such a statute is void as against him for that purpose: *Ogden* v. *Saunders*, 12 Wheat. 213; *Denny* v. *Bennett*, 128 U. S. 489; *Pennoyer* v. *Neff*, 95 Id. 714; *Freeman* v. *Alderson*, 119 Id. 185.

(*b.*) Is it an estoppel *in pais*? No attempt will be made to reconcile the conflicting decisions in the state courts, as it is believed that the question involved is one of federal law: *Given* v. *Wright*, 117 U. S. 648; *Des Moines Nav. Co.* v. *Iowa Co.*, 123 Id. 552; *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Waite* v. *Dowley*, 94 U. S. 527, 532.

In *Embry* v. *Palmer*, 107 U. S. 3, 8, the supreme court held that a creditor who accepts less than his debt, in accordance with a decree of a state court, which was erroneous because it contravened the "full faith and credit" clause of the constitution, does not waive or lose his constitutional right to reverse the decree of the state court, and is entitled to recover the unpaid balance of his debt. The court said: "If the release [of errors] is not expressed, it can arise only upon the principle of estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him": Id. 8.

In *Reynes* v. *Dumont*, 130 U. S. 354, 394, the court cites *Embry* v. *Palmer*, *supra*, with approval, and says: "The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous; nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled."

In the two preceding cases, the decrees of the courts below were not void (as here), but merely erroneous. The reasoning, however, applies *a fortiori* to void decrees; for void decrees may be impeached collaterally as well as by direct proceedings, while erroneous decrees can only be impeached by direct proceedings: *Pennoyer* v. *Neff*, 95 U. S. 714; *Cooper* v. *Reynolds*, 10 Wall. 318; *Needham* v. *Thayer*, 147 Mass. 536.

The cases, cited by the court in the principal case, of *Clay* v. *Smith*, 3 Pet. 411, and *Journeay* v. *Gardner*, 11 Cush. 355 (to which may be added *Gardner* v. *Lee's Bank*, 11 Barb. 558), are illustrations of the doctrine of estoppel by judgment, and not of estoppel *in pais*. In these cases, the non-resident creditor voluntarily appeared in the insolvency court and proved his debt, with resident creditors, without claiming his exemption from the operation of the discharge as a non-resident. After the discharge, he accepted the dividend decreed, and then brought an action to recover the unpaid balance of his original debt. To succeed in such action, it was necessary for him to show that the insolvency court had no jurisdiction over him or his debt, by reason of his non-residence; for want of jurisdiction is the only ground upon which the courts of one sovereignty can refuse to give the same force and

effect to the judgments or decrees of courts of another sovereignty as they have, by law and usage, at home. The constitution expressly ordains this rule as between the courts of the several states; and the act of Congress of 1790 (R. S., sec. 905) declares the same rule as between the state and federal courts: *Crapo* v. *Kelly*, 16 Wall. 610; *Embry* v. *Palmer*, 107 U. S. 3; *Crescent Co.* v. *Butchers' Union*, 120 Id. 141.

This principle is clearly recognized by the supreme court in *Clay* v. *Smith*, *supra*, in which it says that such a non-resident creditor "was bound by the decision of the state court [of insolvency] to the same extent to which citizens of that state were bound." As resident creditors were bound by the discharge, it followed that non-resident creditors who had admitted themselves to be residents for the purpose of that proceeding were also bound by it. The acceptance of a dividend did not raise an estoppel *in pais*. That was not the ground of the decision, as is further shown by the cases which hold that the discharge is binding upon a non-resident creditor who proves his debt without claiming his exemption, although he does not accept a dividend. The sole ground of the decision was, that the discharge was an estoppel by judgment, and not an estoppel *in pais* by the acceptance of the dividend: *Blackman* v. *Green*, 24 Vt. 17, 21; *Baldwin* v. *Hale*, 1 Wall. 223; *Denny* v. *Bennett*, 128 U. S. 489; *Bucklin* v. *Bucklin*, 97 Mass. 256, 258; Cooley on Constitutional Limitations, 294.

Hence the only point necessarily decided in *Clay* v. *Smith*, *supra*, is, that a non-resident creditor who voluntarily proves his debt without claiming his exemption from the operation of the discharge thereby admits himself to be a resident creditor for the purpose of that proceeding, and is therefore subject to the jurisdiction of the insolvency court, and bound by its decree to the same extent as resident creditors; and is estopped to assert, for the purpose of impeaching the discharge collaterally, that he was a non-resident creditor. For although consent of parties cannot confer a jurisdiction which the law has not conferred, still if parties admit the existence of certain jurisdictional facts, they will be estopped, after judgment or decree, to assert that those facts did not exist, and the judgment or decree will be entitled to full force and effect: *Chapman* v. *Forsyth*, 2 How. 202; *Des Moines Co.* v. *Iowa Co.*, 123 U. S. 552; *Railway Co.* v. *Ramsey*, 22 Wall. 322.

In *Chapman* v. *Forsyth*, 2 How. 202, it was held that if a debtor places a fiduciary debt upon his schedule as a common debt, and the creditor proves it as a common debt, without claiming his exemption as a fiduciary creditor, and accepts a dividend, he will be bound by the debtor's discharge under the United States bankrupt act of 1841. This case is also an illustration of the principle of estoppel by judgment; and it does not impugn the doctrine that consent of parties cannot confer a jurisdiction over the cause or subject-matter which the law has not conferred. Although the bankruptcy court had no jurisdiction over a fiduciary debt, as it was saved from the operation of the discharge by the act of 1841, still, as both parties treated the debt as a common debt, the decree of discharge was an adjudication founded on evidence that it was a common debt, which estopped the creditor to assert the contrary afterwards. The court says, referring to a fiduciary creditor: "He does not establish his claim as a fiduciary one, but as a debt 'provable within the statute,' and having done this, he can never controvert the discharge": Id. 209. Whether a debt be a fiduciary debt or a common debt is determined by the facts or manner of its creation, and this is a question of fact. This is the essential fact upon which the jurisdiction of the bankruptcy court over the debt depends. If the bankruptcy court, with any

proof before it having a legal tendency to show that the manner of the debt's creation was such as to render it a common debt, assumes jurisdiction and grants a general discharge, its decree of discharge is not subject to collateral impeachment; for "the rule in such cases is, that if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose": Per Mr. Justice Clifford, in *New Lamp Chimney Co.* v. *Ansonia Brass Co.*, 91 U. S. 656, 659, 660. In the case just cited, the jurisdiction of the bankruptcy court to decree a corporation a bankrupt was attacked collaterally in an action on the original debt, on the ground that the president of the corporation had not been duly authorized to sign and present the petition asking that the corporation be adjudged a bankrupt. But the supreme court held that "whether he was so authorized or not was a question of fact, to be determined by the district court to which the petition was presented"; and that, as the bankruptcy court had adjudged the corporation a bankrupt, after due notice to and appearance by the parties, its decree was not void, and constituted an estoppel by record, which was binding upon the parties in this suit.

When the debtor places a debt upon his schedule as a common debt, and the creditor proves the same debt as a common debt, this is sufficient proof that the manner of the debt's creation was such as to render it a common debt, and as this is the essential jurisdictional fact, it follows that the decree of discharge is not void for want of jurisdiction, and therefore it cannot be impeached collaterally in a subsequent action on the debt as a fiduciary debt. That matter is *res adjudicata* between the debtor and the creditor, and the creditor is estopped by the decree to aver that his debt is a fiduciary debt. It seems that this is the true ground of the decisions in the following cases, in which it was held that a resident creditor, by anterior contract, who proves his debt as a common debt, without claiming that it is saved from the operation of a posterior insolvent law by the constitution, thereby admits facts upon which the jurisdiction of the insolvency court over his debt rests, and, after the decree of discharge, is estopped to assert that his debt arose by anterior contract, and is bound by the discharge, on the principle of estoppel by record, whether he accepts a dividend or not: *Bigelow* v. *Pritchard*, 21 Pick. 169; *Van Hook* v. *Whitlock*, 26 Wend. 43; *Folger* v. *Clark*, 80 Me. 237.

Upon a like principle, a non-resident creditor who proves his debt as a common debt, without claiming his extraterritorial immunity from the operation of the insolvent laws of the debtor's state, thereby admits as a fact that he is a resident creditor for the purpose of that proceeding, which gives the insolvency court jurisdiction over his debt, and after the discharge, he is estopped to assert the contrary fact, and is bound by the discharge, on the principle of estoppel by judgment, whether he accepts a dividend or not: *Clay* v. *Smith*, 3 Pet. 411; *Blackman* v. *Green*, 24 Vt. 17, 21; *Journeay* v. *Gardner*, 11 Cush. 355; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Id. 409; *Denny* v. *Bennett*, 128 U. S. 489. But if, in any of these cases, the creditor appears in the insolvency or bankruptcy court merely to state the true facts and to claim his exemption, the court does not acquire jurisdiction over his debt, even if he accepts a dividend after the discharge, and he can therefore recover the whole or the unpaid balance of his debt; for there is no waiver or estoppel, either *in pais* or by judgment, as such a decision is not to be regarded in the light of *res adjudicata*, so as to defeat an action

for the debt, or its unpaid balance: *Denny* v. *Bennett*, 128 U. S. 489, 499; *Morse* v. *Lowell*, 7 Met. 152; *Sylvester* v. *Danziger*, 32 Fed. Rep. 1; *Norton* v. *Cook*, 9 Conn. 314, 321; 23 Am. Dec. 342; *McCarty* v. *Gibson*, 5 Gratt. 307; *Collins* v. *Rodolph*, 3 G. Greene, 299, 305; *Phillips* v. *Allan*, 8 Barn. & C. 477; *contra*, *Eustis* v. *Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327. *Denny* v. *Bennett*, 128 U. S. 489, was an action of trover brought by Bennett, as assignee in insolvency of A B, against Denny, as United States marshal of the United States circuit court for the district of Minnesota, for the conversion of personal property seized under a writ of attachment by X Y against A B issuing out of that court. Before this action of trover was brought in a state court of Minnesota, and after a refusal by Denny to deliver the goods, Bennett, as assignee, made an application to the United States circuit court to be made a party to the suit of X Y against A B, and prayed for a dissolution of the attachment therein. On this the court ordered, — "1. That Charles C. Bennett, assignee, do have and he is hereby given leave to intervene and become a party defendant herein; 2. That the motion to dissolve the attachment be and the same is hereby denied." Bennett had no other connection with the suit of X Y against A B. On this state of facts, Denny claimed that, as between himself and Bennett, his right to attach and hold the goods was *res adjudicata*. But the supreme court held the contrary, saying: "Even if he [Bennett] can be supposed to be a party, so far as the motion to dissolve the attachment is concerned, we concur with the supreme court of the state of Minnesota (*Bennett* v. *Denny*, 33 Minn. 350) in holding that 'it was merely a decision of a motion or summary application, which is not to be regarded in the light of *res adjudicata*, or as so far conclusive upon the parties as to prevent their drawing the same matters in question again in the more regular form of an action'": Id. 499.

It is true that a person who avails himself of the benefit of an unconstitutional statute to the detriment of another person may be estopped to assert its unconstitutionality in a subsequent action between them: *Daniels* v. *Tearney*, 102 U. S. 415; *Ferguson* v. *Landram*, 5 Bush, 230; 96 Am. Dec. 350. In *Daniels* v. *Tearney*, *supra*, the defendants were obligors on a bond given to the plaintiff, in accordance with a state statute, to stay the levy of an execution on the property of one of the defendants against whom the plaintiff held a judgment. The levy was thereby stayed for several years, and when sued on the bond, the defendants claimed that it was void, because the statute impaired the obligation of the plaintiff's original contract, by allowing a stay of execution to the defendant. But the court held that the defendants were estopped by their conduct to set up this objection. They had procured a benefit to themselves by means of the statute, and had inflicted a serious loss upon the plaintiff. But for the stay bond he would have levied upon the property at once, and sold it to satisfy his judgment. But for the statute, no stay could have been procured. The statute, in terms, gave a right and conferred a benefit, to which the defendants (the parties estopped) were not entitled without the statute. This right of staying execution was detrimental to the plaintiff, and beneficial to the defendants.

The distinction between that case and the principal case is obvious. In the principal case, the party estopped (the plaintiff) did not avail himself of the benefit of the composition act to the detriment of the other party (the defendant). He did not acquire any new right or benefit by the statute. On the contrary, the statute operated exclusively to the benefit of the defendant, and the defendant availed himself of it to the detriment of the plaintiff. If there was anything to estop him, it was this: By the insolvency

proceedings the debtor's property is either seized and taken into the possession of the insolvency court, or moneys are in some manner procured by the debtor, and deposited in court. Such property or moneys cannot be reached by any creditor by attachment or execution, or otherwise than by claiming it from the officer in whose custody it is as the agent of the court. If the creditor claims and obtains it from this officer, he obtains a benefit which he cannot otherwise reap, though what he does in no way prejudices the debtor. A person may unquestionably waive the benefit of a constitutional provision by electing a course of conduct which is inconsistent with the right to claim its benefit. Inconsistency is a necessary element, however, to constitute either a waiver or an estoppel: *People* v. *Murray*, 5 Hill, 468; *Baker* v. *Braman*, 6 Id. 47; 40 Am. Dec. 387; *Detmond* v. *Drake*, 46 N. Y. 318; *Butler* v. *Hildreth*, 5 Met. 49; *Dole* v. *Wooldridge*, 142 Mass. 161, 179; *Eliot* v. *McCormick*, 144 Id. 10. But the better view seems to be that a creditor who accepts part of an ascertained and liquidated debt, in accordance with an unconstitutional statute or void decree, is not guilty of such inconsistent conduct as will preclude him from maintaining a subsequent action for the unpaid balance: *Woodbridge* v. *Wright*, 3 Conn. 523, 526; *Kimberly* v. *Ely*, 6 Pick. 440; *Ex parte Halford*, L. R. 19 Eq. Cas. 436; *Ex parte Hemming*, L. R. 13 Ch. Div. 163, 169.

Montague v. *Massey*, 76 Va. 307, is a well-considered case upon this point. The Virginia legislature passed an act reducing the salary of certain judges during their term of office, contrary to the state constitution. The plaintiff's testator having accepted the reduced salary several times without protest, the state treasurer contended that the plaintiff had waived his rights, and was estopped to insist upon the unconstitutionality of the statute. But the court held that there was no waiver or estoppel, and that the plaintiff could recover the unpaid balance.

To say that a creditor who accepts a dividend avails himself of the benefit of the insolvent law, seems to be a perversion of terms. Without that law, he is entitled to receive the whole of his debt, and the debtor is bound to pay the whole of it. The debtor is the one who avails himself of its benefit. It is neither a legal benefit to a creditor to receive part of an admitted debt after it is due, nor a legal detriment to a debtor to pay part of such a debt, even if he be poor and have to borrow the money. It is for this reason that, ever since *Pinnel's Case*, 5 Coke, 117, it has been the law of England and America that such part payment and acceptance are no consideration for a parol agreement to accept the part in full satisfaction of the debt, and that therefore the creditor can recover the unpaid balance: *Harriman* v. *Harriman*, 12 Gray, 341; *Weber* v. *Couch*, 134 Mass. 26; 45 Am. Rep. 274. Nor does such acceptance in full satisfaction operate as a waiver or estoppel against the creditor which will prevent a recovery of the unpaid balance: *Tyler* v. *Relief Ass'n*, 145 Mass. 134, 138; *Martin* v. *Frantz*, 127 Pa. St. 389; *Mechanics' Bank* v. *Huston*, 11 Week. Not. 389; *Walker* v. *Mayo*, 143 Mass. 42. If the creditor's acceptance of part of his debt, in accordance with a parol agreement to accept it in full satisfaction, is no waiver or estoppel of his common-law right to receive every dollar originally due him, notwithstanding the agreement, it seems to follow *a fortiori* that a creditor's acceptance of part of his debt, in accordance with a void decree of discharge in insolvency, is no waiver or estoppel of his constitutional right to receive every dollar originally due him on his contract, notwithstanding the discharge: *Kimberly* v. *Ely*, 6 Pick. 440; *Woodbridge* v. *Wright*, 3 Conn. 523. For, as a constitutional right is of a higher nature than a com-

mon-law right, it takes stronger acts to amount to a waiver or estoppel of the former than of the latter. The party's acts must be "clear and unequivocal": *Donnelly* v. *Corbett*, 7 N. Y. 500, 507; *Guernsey* v. *Wood*, 130 Mass. 503; *Murphy* v. *Manning*, 134 Id. 488; *Easterly* v. *Goodwin*, 35 Conn. 279; *Insurance Co.* v. *Morse*, 20 Wall. 445.

The following points on waiver and estoppel may be considered settled: A written agreement between a non-resident creditor and his debtor, that "this judgment [entered by confession] is subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland," is no waiver of the non-resident creditor's right to impeach the decree of discharge, and to enforce the judgment to its full extent by execution against property which was exempt under the Maryland insolvent law (*Clay* v. *Smith*, 3 Pet. 411, was cited by counsel to the point of waiver): *Boyle* v. *Zacharie*, 6 Id. 635. A non-resident creditor does not waive his constitutional right to impeach his debtor's discharge by having come into the debtor's state to make his contract while the insolvent law was in force, and by expressly providing for its performance in the debtor's state. He can recover the whole of his demand: *Baldwin* v. *Hale*, 1 Wall. 223. A non-resident creditor does not waive his constitutional right to impeach a decree of discharge in insolvency by having, prior to the discharge, reduced his claim to judgment in the courts of the debtor's state; and after the discharge, he can maintain an action on his judgment either in the courts of the debtor's state, or in any other court: *Murphy* v. *Manning*, 134 Mass. 488; *Donnelly* v. *Corbett*, 7 N. Y. 500; *Wyman* v. *Mitchell*, 1 Cow. 316; *Whitney* v. *Whiting*, 35 N. H. 457; *Poe* v. *Duck*, 5 Md. 1; *Watson* v. *Bourne*, 10 Mass. 337; 6 Am. Dec. 129. A non-resident creditor does not submit himself to the jurisdiction of an insolvency court, nor waive his constitutional right to recover a judgment for the whole of his demand, by appearing in the insolvency court to oppose the granting of the discharge: *Norton* v. *Cook*, 9 Conn. 314; 23 Am. Dec. 342; *McCarty* v. *Gibson*, 5 Gratt. 307; *Collins* v. *Rodolph*, 3 G. Greene, 299.

Applying the foregoing principles to the principal case, the conclusions seem to be as follows: 1. The decree of discharge was void for want of jurisdiction when rendered, as against the unconsenting non-resident creditor. 2. It did not become valid by his subsequent acceptance of the dividend. 3. By accepting the dividend, the non-resident creditor did not waive or otherwise lose his constitutional right to receive the full amount originally due him. 4. Therefore he was entitled to recover a judgment for the unpaid balance after deducting the dividend, and the judgment in the principal case is erroneous.

Whether these apparently logical deductions will ultimately prevail when the question shall be directly presented to the supreme court of the United States, is at present unknown. The decisions in the state courts, excepting those of the state of Connecticut, must be conceded as directly or inferentially supporting the principal case: *Van Hook* v. *Whitlock*, 26 Wend. 43; *Eustis* v. *Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327; *Folger* v. *Clark*, 80 Me. 237; *Burpee* v. *Sparhawk*, 108 Mass. 111; 11 Am. Rep. 320.

FARRINGTON *v.* SOUTH BOSTON RAILROAD COMPANY.

[120 MASSACHUSETTS, 406.]

PRINCIPAL AND AGENT. — ONE DEALING WITH AN AGENT IN A MATTER AFFECTING HIS PRINCIPAL, and knowing that the interest of the agent is adverse to that of his principal, should be held to the duty of ascertaining that the acts of the agent are authorized by his principal.

IF STOCK OF A CORPORATION IS FRAUDULENTLY ISSUED BY ONE OF ITS OFFICERS AS SECURITY FOR HIS PRIVATE DEBT, the corporation is not estopped, as against the creditor of the officer to whom such stock was issued, to deny the validity of the stock, if the creditor knew that the surrender and transfer of the former certificate were prerequisites to the lawful issue of a new one, and took no steps to assure himself that there was a former certificate to be surrendered and transferred. Such creditor acquires no additional right or equity from the fact the certificate fraudulently issued to him was afterwards surrendered by him, and a new one issued therefor by the officer by whom and for whose benefit the original was fraudulently issued.

ACTION to recover damages for the refusal of the defendant corporation to recognize the validity of shares of stock held by the plaintiff, or to transfer them, and issue new certificates therefor.

O. B. Mowry, for the plaintiff.

J. G. Abbott, C. T. Gallagher, and J. S. Dean, for the defendant.

FIELD, J. The plaintiff, in December, 1882, lent money to William Reed, and received from him as security for the payment of the loan a certificate, in the name of the plaintiff, of thirty-two shares of the capital stock of the defendant corporation, in the usual form, signed by its president and by its treasurer, with its seal affixed. This was a fraudulent overissue of stock by Reed, who was the treasurer, and who filled up a blank certificate which had been signed by the president, and left with him. Reed owned no stock, and exhibited no certificate of stock to the plaintiff except that filled up with the plaintiff's name, and he made no transfer of stock on the books of the company, and there was no entry of the transaction in any form upon its books. The stock of the company was transferable by assignment on the books of the company, upon a surrender of the old certificate, and this was stated in the certificate delivered to the plaintiff. The plaintiff, in May, 1886, assigned this certificate to one Wilkins, the cashier of the Howard National Bank, as security for the payment of a loan of money made to the plaintiff by the bank. Wilkins

surrendered this certificate, and took a new one in his own name, which was issued to him by Reed, who, as treasurer, had the custody of the certificate and transfer-books of the company. The plaintiff, in January, 1887, paid his debt to the Howard National Bank, and Wilkins assigned the certificate he held to the plaintiff. The plaintiff, in July, 1887, presented this certificate to the defendant, and demanded a new certificate, which the defendant refused to give, having discovered, in November, 1886, this and other frauds of Reed. The original loan of the plaintiff to Reed was two thousand dollars; but in October, 1886, the plaintiff lent him one thousand dollars more, and it was agreed between them that the certificate of stock should stand as security for the payment of both loans. The amount due from Reed to the plaintiff at the date of the writ was $3,175.84.

It is manifest that the assignment of this certificate by the plaintiff to Wilkins, as security for the payment of the plaintiff's debt to the bank, and the assignment back to the plaintiff when his debt was paid, did not put the plaintiff in any better position than he would have been in if the certificate had never passed out of his hands. The plaintiff had pledged property which had been pledged to him, and had redeemed it from the pledge he had made, and he held it by his original title as pledgee of Reed: *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188.

The present case cannot be distinguished in principle from *Moores* v. *Citizens' National Bank*, 111 U. S. 156. In that case Mr. Justice Bradley dissented, and the decision has been the subject of some criticism: Lowell on Transfer of Stock, sec. 112, note 2. The ground of that decision, as stated in the opinion, is as follows: The plaintiff "having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner, and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity." Upon a review of the authorities in the opinion, it is said: "This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually,

and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier."

In that case the president of the bank had left blank certificates of stock signed by him with the cashier, as, in the present case, the president of the railroad company had left similar blank certificates with the treasurer. At the trial of that case in the United States circuit court, a verdict was directed for the defendant, on the ground that "the plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier, — that is, acting for the bank upon one side, and for himself on the other, in reference to the matter of issuing this certificate, — she is not, in the judgment of this court, an innocent holder of the stock": *Moores* v. *Citizens' National Bank*, 15 Fed. Rep. 141.

We have decided in *Allen* v. *South Boston R. R.*, 150 Mass. 200, 204, that a purchaser of stock owes no positive duty to the corporation to see to it that the seller surrenders the old certificate and makes an assignment of the stock on the books of the company, but that it is the duty of the corporation which requires these things to be done to see that they are done before a new certificate is issued to the purchaser. The plaintiff, in the case at bar, knew that he was dealing with the treasurer of the defendant in his personal capacity as a borrower of money. If the by-laws of the company had provided that certificates of stock should be signed only by the treasurer, and if he were charged with the duty of attending to the transfer of stock and the issuing of certificates, any person lending money to him for his private use, and taking in his own name a certificate of the company's stock as collateral security, would reasonably be required to investigate the title of the treasurer to the certificate delivered, because in issuing such a certificate the treasurer would have a personal interest adverse to that of the corporation. An agent cannot properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent

are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal. The difficulty in the present case is, that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates that the by-laws of corporations usually require the certificates to be signed by at least two officers of the corporation. If one of these neglects his duty, or delegates the performance of it to the other, the safeguard intended by this requirement of the by-laws becomes ineffectual, and if one of these officers, in issuing a stock certificate, has a personal interest adverse to that of the corporation, a person dealing with him, and knowing this, may well be required to take notice that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws.

The decision of this case, we think, must depend upon the question whether it is shown that the plaintiff, in taking this certificate of stock under the circumstances set out in the agreed statement of facts, acted in good faith and with due care. We are of opinion that the facts were such that the plaintiff was reasonably put upon inquiry as to the title of Reed to the certificate of stock which he undertook to pledge, and that the plaintiff is to be affected with notice of whatever he might have found out, if he had made proper inquiry. As the plaintiff was not a purchaser of stock in the market, the usages of brokers in regard to the manner in which stock is transferred, as between the parties to a bargain and sale made through brokers, have no bearing upon the case. The plaintiff cannot rely upon any representations of Reed, because he knew that Reed was acting for himself in borrowing the money and in pledging the stock.

The seal of the corporation might well be presumed to be under the control of Reed for the purpose of affixing an impress of it upon the stock certificates, because he was one of the persons who were required to sign certificates of stock, and was the person who had the custody of the certificate and transfer-books. The genuine signature of the president of the corporation upon the certificate was the only fact on which the plaintiff had a right to rely; but as the president was not attending personally to the issue of this certificate, it was evident to the plaintiff that Reed might possibly be using for one purpose a certificate signed by the president for another. The

certificate was filled up in Reed's handwriting, and nothing whatever was exhibited to the plaintiff tending to show that Reed owned any stock, or that any transfer of stock had been made to the plaintiff by Reed, except the new certificate which was issued to the plaintiff after the bargain between him and Reed had been made.

We think that it is a safer and more reasonable rule to hold that a person taking in pledge a certificate of stock, newly issued in his name by an officer of a corporation, as security for the private debt of the officer, should be required to investigate the title to the stock, if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued. In the opinion of a majority of the court, the judgment entered for the plaintiff must be reversed, and there must be judgment for the defendant.

THIS CASE IS DISTINGUISHED from the case of *Allen* v. *South Boston R. R.*, 150 Mass. 200, *ante*, p. 185, in which the plaintiff was a purchaser of stock, and where it was held that a purchaser of stock in a corporation does not assume any duty to see that the vendor of the stock surrenders his stock and transfers it upon the books of the corporation, inasmuch as such is the duty of the corporation towards both the seller and the purchaser before it issues new stock. In the principal case, plaintiff was not a purchaser of stock, but knew that he was dealing with the treasurer of the corporation in his personal capacity as a borrower of money; and consequently in taking certificates of stock, newly issued in his name, as collateral security for money lent to the treasurer in his individual capacity, he must investigate the title to such stock, and is not a *bona fide* purchaser if the stock was fraudulently issued, even though the treasurer had apparent authority to issue such certificates of stock.

MONAHAN *v.* WORCESTER.

[150 MASSACHUSETTS, 439.]

EVIDENCE — EMPLOYER AND EMPLOYEE. — EVIDENCE THAT AN EMPLOYEE WAS GENERALLY REPUTED to be infirm in his senses of sight and hearing, and in physical strength, is admissible for the purpose of proving that his employer either knew of these infirmities, or by the exercise of reasonable care would have known of them.

ACTION to recover for personal injuries suffered by the plaintiff while in the employ of the defendant, and which injuries it was claimed had resulted from plaintiff's co-employee McLoughlin having lost control of a wheel-barrow of bricks,

whereby a portion of its load was emptied into a trench and fell upon plaintiff. The claim was made that the accident would not have occurred but for McLoughlin's age and infirmities, and his impaired sight and hearing. The plaintiff offered evidence tending to show that McLoughlin was generally reputed to be infirm in the senses of sight and hearing, and in physical strength, and that his infirmities in this respect were well known in the community. The evidence was excluded by the court, and the jury thereupon returned a verdict for the defendant.

J. Hopkins and E. J. McMahon, for the plaintiff.

F. P. Goulding, for the defendant.

FIELD, J. The offer of the plaintiff to show that McLoughlin "was generally reputed to be infirm in the senses of sight and hearing, and in physical strength," was made for the purpose of proving that the defendant either knew of these infirmities, or by the exercise of reasonable care would have known of them, if the jury found, from other evidence, that McLoughlin was infirm in these respects. For this purpose, in our opinion, the evidence was competent. The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant. We cannot say that it may not be a matter of common repute in a community that a man is physically weak, and is partially blind and deaf: *Gilman* v. *Eastern R. R.*, 13 Allen, 433; 90 Am. Dec. 210.

Exceptions sustained.

EVIDENCE. — General notoriety is generally admissible as evidence tending to prove notice of a fact, when such notice is a material inquiry; but it is never competent to prove the fact itself: *Louisville etc. R. R. Co.* v. *Hall*, 87 Ala. 708; 13 Am. St. Rep. 84.

DUBE *v.* BEAUDRY.

[150 MASSACHUSETTS, 448.]

MINOR MAY AVOID HIS CONTRACT WITHOUT PUTTING THE OTHER PARTY IN STATU QUO or returning the consideration received, if the contract was not for necessaries, nor necessarily beneficial to the minor.

MINOR CONTRACTING TO WORK FOR ANOTHER, AND THAT PART OF HIS WAGES SHOULD BE APPLIED TO THE PAYMENT OF A DEBT DUE FROM HIS FATHER'S ESTATE, may, by disaffirming the contract, and suing upon a *quantum meruit*, recover the full value of services rendered by him, where it does not appear that he can receive any benefit from his father's estate.

ACTION to recover the balance claimed to be due plaintiff for wages. The trial court ruled that the plaintiff was not entitled to recover, because his services had been rendered under the contract set forth in the opinion of the court.

C. Sewall, for the plaintiff.

J. M. Raymond, for the defendant.

FIELD, J. The plaintiff, a minor, with the assent of his mother, agreed with the defendant to work for him for eight dollars a week, one half to be paid to the plaintiff, and the other half to be applied by the defendant to the payment of a debt due to the defendant from the estate of the deceased father of the plaintiff. The judge, who tried the case without a jury, found that the plaintiff's services were not worth eight dollars a week for the first part of the time he worked, but "were worth eight dollars a week for the whole time." The plaintiff's pay was raised from time to time, and, after he had worked for the defendant eight weeks, "his pay was raised to twelve dollars" a week. The defendant paid him four dollars a week for the whole time he worked, and applied the remainder of his wages to the payment of the debt against the father's estate. At the end of twenty-six weeks, when the debt had been paid, the defendant discharged the plaintiff from his employment. The judge also found that "the agreement was not so unreasonable as to raise any suspicion of fraud"; "that the plaintiff had not been overreached"; and ruled, "as matter of law, that the plaintiff was not entitled to avoid the contract, it having been fully executed." It is clear that the judge found that the whole amount of the wages agreed upon from time to time was as much as or more than the plaintiff's services were worth, but that the amount of money paid to the plaintiff was less than his services were worth. It is clear, also, that the

plaintiff was not bound to pay his father's debts; that the contract made in this case was not for necessaries, and was not necessarily beneficial to the plaintiff; and that by our decisions, in order to avoid such a contract, it is generally not necessary that the minor put the other party *in statu quo*, or return the consideration received: *Chandler* v. *Simmons*, 97 Mass. 508, 514; 93 Am. Dec. 117; *Bartlett* v. *Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101; *Gaffney* v. *Hayden*, 110 Mass. 137; 14 Am. Rep. 580; *Bradford* v. *French*, 110 Mass. 365; *Walsh* v. *Young*, 110 Id. 396; *Baker* v. *Stone*, 136 Id. 405; *McCarthy* v. *Henderson*, 138 Id. 310.

Gaffney v. *Hayden*, *supra*, shows that, if the amount of the wages agreed upon had not been as much as the plaintiff's services were worth, the fact that the plaintiff had received his pay while a minor would not prevent him from avoiding the contract, and suing on a *quantum meruit*. In the opinion, the cases of *Stone* v. *Dennison*, 13 Pick. 1, 23 Am. Dec. 654, and *Breed* v. *Judd*, 1 Gray, 455, which the present defendant cites, are considered and distinguished.

It is suggested that the plaintiff's agreement that the defendant should apply a part of the wages to the extinguishment of the father's indebtedness makes the actual application of the wages by the defendant in pursuance of this agreement, and before it was revoked, equivalent to a payment of money by the plaintiff to the defendant for the purpose of extinguishing this debt. It is argued that, if a minor voluntarily pays money under a contract, he cannot recover the money he has paid, when he has received any benefit from the contract, or any part of the consideration, except by rescinding the contract; and that a contract cannot be rescinded unless the other party is put *in statu quo;* and that, in the present case, it does not appear that the defendant can be put *in statu quo*, because he may have lost his remedy against the estate of the father. See *Shurtleff* v. *Millard*, 12 R. I. 272; 34 Am. Rep. 640; *Robinson* v. *Weeks*, 56 Me. 102; *Sparman* v. *Keim*, 83 N. Y. 245; *Adams* v. *Beall*, 67 Md. 53; 1 Am. St. Rep. 379; *Ex parte Taylor*, 8 De Gex, M. & G. 254. It does not appear that the plaintiff did or could receive any benefit, directly or indirectly, from the payment of his father's debts. It appears that the father died seised of real estate, "which he devised to his widow," and which the widow conveyed to his eldest son, the brother of the plaintiff; but it does not appear that the plaintiff was entitled to receive any property from the estate of his father,

and therefore it does not appear that the plaintiff had any interest in preventing the defendant from collecting the debt out of the estate of the father. The action is not to recover money paid. The contract, so far as it related to the payment of the father's debt, would, in ancient times, have been held absolutely void, if made by an infant. We think that the principle contended for, whether it is consistent or not with our decisions, is not applicable to this case. It is necessary for the protection of an infant that he should not be bound by a contract to pay out of his earnings the debt of another person, and the defendant had no right to rely upon such a contract, and forego any remedies he might have against the estate of the father. The defendant cannot be said to have acted as agent of the plaintiff in paying the wages to himself, within the principle declared in *Welch* v. *Welch*, 103 Mass. 562, because he still retains the benefit. It is not contended that the mother was entitled to the wages of the plaintiff. By the terms of the report, there must be a new trial.

So ordered.

CONTRACTS OF MINORS. — As to an infant's power to avoid his contracts: *Adams* v. *Beall*, 67 Md. 53; 1 Am. St. Rep. 379, and cases cited in note. An infant may, in general, disaffirm his contract without restoring the consideration received by him: *Stull* v. *Harris*, 51 Ark. 295.

BOSTON *v.* SIMMONS.

[150 MASSACHUSETTS, 461.]

LIABILITY OF OFFICER OF CITY AND HIS CONFEDERATE FOR PROFITS REALIZED FROM THE USE OF THE FORMER'S KNOWLEDGE OBTAINED AS SUCH OFFICER. — If a member of a municipal board authorized to select and purchase a site for public purposes agrees with a third person to inform the latter of the site selected by such board, and that the latter shall thereupon purchase such site, and then sell it to the board at a profit, and the agreement is carried out through the aid of such officer, whereby the municipality is made to pay a higher price for the property than it could have been purchased for from the original owner, a joint action can be sustained against said officer and his confederate for the amount of profit by them realized.

ACTION of tort, in which the declaration was as follows: "And the plaintiff says that at the time of the acts and doings hereinafter set forth, it was, and now is, a municipal corporation duly established by law, in the county of Suffolk, in this commonwealth, and was duly authorized by law to purchase

land on which to construct a reservoir to be used in supplying said city and its inhabitants with pure water; that the defendant Simmons was a member and the chairman of the Boston water board, a board duly established by law, and authorized and empowered to purchase for the plaintiff land to be used for the purpose aforesaid; that said Simmons, by virtue of his said official position, knew and had a part and share in determining the action of said water board, under said authority, in making such purchase; that said defendant Wilson well knew of said position, knowledge, and authority of said Simmons; and that said defendants corruptly took advantage of such position, knowledge, and authority, and, intending and contriving to cheat and defraud the plaintiff, did corruptly and fraudulently conspire and agree with each other that the said Simmons should impart to said Wilson knowledge of the doings of the said water board in the selection of said land, and of the piece of land which said board should consider suitable for a site for said reservoir, did conspire and agree that said Wilson should become the purchaser and owner of the lot of land which should be so considered suitable for a site for said reservoir, did conspire and agree that said water board, acting for the plaintiff, should purchase the said land for the plaintiff from said Wilson, at an advance or increase above the price paid therefor by said Wilson, and did so conspire and agree to divide the profits of said transaction between themselves; and the plaintiff further says that in consequence and pursuance of said corrupt and fraudulent conspiracy and agreement, said Simmons did impart to said Wilson said knowledge, and that said water board had considered a certain lot of land suitable for a site for said reservoir (which said water board had in fact done); that said Wilson did thereupon purchase said lot of land (more particularly described in a certain deed thereof to the plaintiff which will be produced if required), and thereafter said water board, acting in behalf of the plaintiff, being thereto influenced and induced by said Simmons, did purchase said land for said city, of said Wilson, and did cause said city to pay therefor the sum of $91,934, being in excess over the sum paid therefor by said Wilson, and over the price at which said water board could have purchased the same but for said corrupt and wrongful agreement and acts of said defendants, and said purchase by said Wilson, by the sum of $50,488. And said defendants did divide the profits of said fraudulent trans-

action between themselves; and the plaintiff further says that by said corrupt and fraudulent conspiracy, agreement, and acts of said defendants, the plaintiff was unjustly, unlawfully, and wrongfully deprived, defrauded, and cheated of said sum of $50,488." The declaration was demurred to, and the demurrer was sustained by the superior court, and judgment was thereupon entered for the defendants.

S. J. Thomas and A. Russ, and D. A. Dorr, for the defendant.

A. J. Bailey, for the plaintiff.

DEVENS, J. The averment of a conspiracy in the declaration does not ordinarily change the nature of the action, nor add to its legal force or effect. The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff, and the damage thereby done it wrongfully. Where damage results from an act which, if done by one alone, would not afford ground of action, the like act would not be rendered actionable because done by several in pursuance of a conspiracy: *Wellington* v. *Small*, 3 Cush. 145; 50 Am. Dec. 719; *Parker* v. *Huntington*, 2 Gray, 124; *Hayward* v. *Draper*, 3 Allen, 551, 552; *Randall* v. *Hazelton*, 12 Id. 417; *Bowen* v. *Matheson*, 14 Id. 499. On the other hand, when the tort committed and the damage resulting therefrom proceed from a series of connected acts, the averment that they were done by several in pursuance of a conspiracy does not so change the nature of the action, that, if the wrongful acts are shown to have been done by one only, it cannot be maintained against him alone, and the other defendants exonerated. As it would be necessary in the case at bar, in order that both defendants should be held responsible, to prove a combination and united action on their part, the allegation of a conspiracy is a convenient and proper mode of alleging such combination and action. For any other purpose, it is wholly immaterial.

The declaration to which the defendants have demurred, and the allegations, which we must take for the purpose of this hearing to be true, omitting the expletives by which they have been characterized, are, that Simmons was a member of the water board of the city of Boston, which board was empowered and authorized to purchase for the city land for the purpose of constructing a reservoir; that he knew and had a share in determining the action of the board in making such purchase, and, further, that Wilson had knowledge of the position, knowledge, and authority of Simmons; that together, taking

advantage of this, and intending to defraud the plaintiff, it was agreed corruptly between them that Simmons should inform Wilson of the doings of the board in the selection of the land and of the piece which they should consider suitable for a site for said reservoir; and that they further agreed that Wilson should become the purchaser of this lot, that it should afterwards be purchased by the board at an advanced price, and that the profits should be divided between themselves. The declaration further avers that, in pursuance of this agreement, Simmons did impart to Wilson that the board had considered a particular lot suitable for a reservoir; that it was then bought by Wilson; that thereafter the board, influenced by Simmons, did purchase this land for the city at an advanced price from Wilson; and that Wilson and Simmons divided the profits of the transaction.

If this whole transaction, as described by the declaration, had been conducted by Simmons alone, without aid from or intervention of Wilson, — if, knowing the determination of the board that the lot in question was suitable for the purpose, he had himself purchased it, and then, availing himself of his influence with the board, had induced it to purchase the lot from him at an advanced price, — he certainly would have been liable to the city for the injury occasioned by this abuse of his trust. He was one of the officials of the city, acting on its behalf, bound to act in good faith, to make a proper selection of the lot for a reservoir, and to purchase it at the most reasonable price: *Walker* v. *Osgood*, 98 Mass. 348; 93 Am. Dec. 168; *Cutter* v. *Demmon*, 111 Mass. 474; *Rice* v. *Wood*, 113 Id. 133, 135; 18 Am. Rep. 459. To purchase himself the lot of land which he knew the board of which he was a member had considered suitable, with a view to compel it to pay an advanced price therefor, and thereafter to avail himself of his influence with the board to have this advanced price actually paid, and thus to obtain a profit, would be a violation of the duty he owed to the city, and a wrong done to the city, for which it should be entitled to a remedy. The fact that he acted according to the averments of the declaration in connection with another party, presumably that his relation to the purchase might not appear and his influence be thus destroyed, does not diminish his own responsibility; while the other, who participated in the scheme, and who has knowingly aided and abetted in the transaction, and shared its profits in pursuance of their agreement so to do, becomes a wrong-doer with him:

Adams v. *Paige*, 7 Pick. 542, 550; *Emery* v. *Hapgood*, 7 Gray, 55, 58; 66 Am. Dec. 459; *United States* v. *State Bank*, 96 U. S. 30, 35.

It is said, on behalf of Wilson, that nothing had been done towards the purchase of the lot when Simmons imparted to him the information; that the allegation that the board had considered the lot in question as suitable for the reservoir is not an allegation that anything was actually done towards its purchase; that Wilson might elsewhere have obtained information that the members of the board were talking of buying the lot; that this conversation gave them no right in it; that the owner could still properly sell to whom he pleased; and that Wilson had the same right to purchase that any one has who buys an estate in anticipation of future uses which will make it more valuable.

While it is true that one may avail himself of his own judgment, or of information properly obtained, to purchase land in anticipation of its rise in value, it is quite a different question whether one who knows another to be acting for a principal who desires to purchase a piece of land may, on receiving information of this from the agent, purchase the land himself, upon an arrangement with the agent that he will use his efforts to induce the principal to complete the purchase at an advanced price, and then divide the profits with him. The abuse of trust of which the agent is guilty, with his knowledge and co-operation, is a wrong for which both are liable, as the injury to the principal is the result of their combined action. Where an agent purchased property for his principal, and falsely represented that he had paid for it a larger sum than he had actually paid, it was held that he would be liable for such overplus. There is no reason why one who has intentionally co-operated with him, and has enabled him to commit the fraud, should not be equally liable: *McMillan* v. *Arthur*, 98 N. Y. 167. The owner or *cestui que trust* may pursue the trust funds into whosesoever hands they may have passed, so long as they can be traced, and knowledge of their character can be brought home to the possessor. Not less should the principal, who has been wronged by the misconduct of its own agent, be allowed to pursue, not merely him, but those who have actively co-operated in his breach of duty, and accepted their share of the profits of the transaction.

It is not important that the board, when, as it is alleged,

Simmons informed Wilson that it had determined that the lot was a suitable one for the reservoir, does not appear to have then finally decided to take it, or that Simmons alone could not have compelled them to take it. He had no right to confide to another the result of the deliberations of the board so far as they had progressed. If he did so, and if, with full knowledge on the part of both, the two entered into an agreement that Wilson should then purchase and hold the land for an advanced price, to be divided between them if the operation should prove successful, while Simmons should use his influence with the board, of which he was a member, to have it purchased at the advanced price, an agreement was made to commit a fraud upon the city. If the allegations made shall be proved, and if the fraud shall have been consummated by means of the information imparted by Simmons, the purchase made by Wilson, and the influence of Simmons with the board, which were all parts of the same plan, the defendants are alike liable for the injury which the city has sustained.

Demurrer overruled.

TORTS. — All who aid in the commission of a tort are joint tort-feasors, and, as such, jointly liable for the result of their act: *Moir* v. *Hopkins*, 16 Ill. 313; 63 Am. Dec. 312; *Klauder* v. *McGrath*, 35 Pa. St. 128; 78 Am. Dec. 329; *Creed* v. *Hartmann*, 29 N. Y. 591; 86 Am. Dec. 341, and note; note to *Navigation Co.* v. *Richards*, 98 Id. 212, 213.

HOPEWELL MILLS *v.* TAUNTON SAVINGS BANK.

[150 MASSACHUSETTS, 519.]

FIXTURES. — CHARACTER OF PROPERTY, AS REAL OR PERSONAL, may be fixed by contract with the owner of the real estate when the article is placed in position, but such contract cannot affect the rights of a mortgagee, or an innocent purchaser without notice.

FIXTURES — CHARACTER OF PROPERTY, HOW DETERMINED. — Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications arising from the intention implied and manifested by the party so placing it, and which show whether or not it belongs to the building as an article designated to become part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted.

FIXTURES — WHAT ARE, ON MORTGAGED PROPERTY. — Whatever is placed in a building subject to a mortgage, by a mortgagor, or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be

removed without injury to itself or the building, becomes part of the realty.

FIXTURES ON MORTGAGED PROPERTY, WHAT ARE. — Heavy machinery, procured for use in manufacturing cotton cloth, and placed in a mortgaged cotton-mill, with much to indicate that, while there were changes in the kind of goods manufactured, the machinery was not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until worn out, or until, from some unforeseen cause, the real estate should be changed, and put to a different use, and attached to the building by being fastened to the floor, and connected with the motive power, with a view to permanence, becomes a fixture, and trover will not lie for its conversion.

TORT for the conversion of certain cotton machinery, placed in a cotton-mill, and consisting of a ring frame, mules, looms and loom-beams, a skein-winder, reel, cop-spooler, dresser, four dobby-heads, a picker-head, or beater, and a cloth-brush and shear. This machinery was heavy, and was connected with the power operating the mill by means of pulleys, belts, and shafting, but could be taken out of the mill without injury to the mill, the machinery, or the real estate, except that screw-holes would be left in the floor of the mill, to which the machinery was attached by means of screws. The machinery was adapted to the uses for which it was placed in the mill, namely, the manufacture of cotton cloth; and though not especially built for use in that particular mill, it could as well be used for the same purpose in any other similar mill. Plaintiff, by purchase, became the owner of the cotton-mill and other buildings situated on certain land, and also of a water privilege, by which, together with steam-power, the mill was operated. This purchase was made subject to a mortgage, which included the mill, "with all machinery, tools, and fixtures and furniture therewith appertaining." Subsequently, the machinery in controversy was purchased by plaintiff and placed in the mill, and afterwards the mortgagee foreclosed his mortgage, and conveyed the property to third parties by deed, including the "machinery, tools, and furniture thereto appertaining and belonging." The purchasers entered into possession of the mill and machinery in suit therein, and commenced to use the whole in the manufacture of cotton cloth, and refused to give it up, or allow plaintiff to remove it, although due demand was made. Other facts appear from the opinion.

T. L. Livermore and W. K. Richardson, for the plaintiff.

A. M. Alger, for the defendants.

KNOWLTON, J. This case is submitted on an agreed statement of facts; and, since the burden of proof is on the plaintiff, there must be judgment for the defendants, unless the facts stated establish the plaintiff's title.

There is some conflict of authority, in different jurisdictions, in regard to the question when machines placed in a building become fixtures which pass with a conveyance of the real estate. In this commonwealth, the general principles applicable to such cases have often been considered, and are well established; but there is frequently difficulty in the application of them to particular cases.

The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position; but such a contract cannot affect the rights of a mortgagee, or of an innocent purchaser without notice of it: *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *Thompson* v. *Vinton*, 121 Id. 139; *Southbridge Savings Bank* v. *Exeter Machine Works*, 127 Id. 542, 545; *Case Mfg. Co.* v. *Garven*, 45 Ohio St. 289. Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted,—an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place: *Turner* v. *Wentworth*, 119 Mass. 459; *Southbridge Savings Bank* v. *Exeter Machine Works*, 127 Id. 542, 545; *Allen* v. *Mooney*, 130 Id. 155; *Smith Paper Co.* v. *Servin*, 130 Id. 511, 513; *Hubbell* v. *East Cambridge Bank*, 132 Id. 447; 43 Am. Rep. 446; *Maguire* v. *Park*, 140 Mass. 21; *McRea* v. *Central Nat. Bank*, 66 N. Y. 489; *Hill* v. *Farmers' etc. Nat. Bank*, 97 U. S. 450; *Ottumwa Woolen Mill* v. *Hawley*, 44 Iowa, 57; 24 Am. Rep. 719. These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret pur-

pose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position.

Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact: *Turner* v. *Wentworth*, 119 Mass. 459; *Allen* v. *Mooney*, 130 Id. 155; *Maguire* v. *Park*, 140 Id. 21; *Carpenter* v. *Walker*, 140 Id. 416; *Southbridge Savings Bank* v. *Mason*, 147 Id. 500. But the principal facts, when stated, are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can decide the question. The nature of the article, and the object, the effect, and the mode of its annexation, are all to be considered. In this commonwealth it has been said that "whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty": *Southbridge Savings Bank* v. *Mason*, 147 Mass. 500; *Pierce* v. *George*, 108 Id. 78; 11 Am. Rep. 310. This rule generally prevails also in other jurisdictions: *Parsons* v. *Copeland*, 38 Me. 537; *Holland* v. *Hodgson*, L. R. 7 Com. P. 328; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *McRea* v. *Central Nat. Bank*, 66 N. Y. 489; *Hill* v. *Farmers' etc. Nat. Bank*, 97 U. S. 450; *Harlan* v. *Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Delaware etc. R. R. Co.* v. *Oxford Iron Co.*, 36 N. J. Eq. 452; *Roddy* v. *Brick*, 15 Id. 218, 225; *Ottumwa Woolen Mill* v. *Hawley*, 44 Iowa, 57; 24 Am. Rep. 719.

We are of opinion that this rule is applicable to the case at bar. The building mortgaged was a cotton-mill, and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy; and there is much to indicate that, while there were changes in the kinds of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until they should be worn out, or until, for some unforeseen cause, the real estate should be changed, and put to a different use. Of most of them, it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in

use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence. The loom-beams are essential parts of the looms; and although they are not fastened to the looms, but are laid upon them when in use, they are no less real estate than those parts of the looms which are annexed to the realty. No suggestion is made in regard to any other part of the property which calls for a distinction between different articles.

We are of opinion that the agreed facts do not show that the machinery was personal property for which trover can be maintained, and the entry must be, judgment for the defendants.

FIXTURES — WHAT ARE: See *Collamore* v. *Gillis*, 149 Mass. 578; 14 Am. St. Rep. 460, and note; *Lavenson* v. *Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147, and note.

FIXTURES. — By agreement, property which would otherwise be a fixture, by reason of its annexation to the freehold, may retain its character as personalty: *Booth* v. *Oliver*, 67 Mich. 664; *Docking* v. *Frazell*, 38 Kan. 420; *Tyson* v. *Post*, 108 N. Y. 217; 2 Am. St. Rep. 409; *Goodman* v. *Hannibal etc. R. R. Co.*, 45 Mo. 33; 100 Am. Dec. 336; note to *Lavenson* v. *Standard Soap Co.*, 13 Am. St. Rep. 153; *Laird* v. *Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564, and note.

FIXTURES — TESTS OF. — To determine whether a thing is a fixture or not, we must look at the manner in which it was annexed, the intention of the person making the annexation, and the purposes for which the premises are used: *Lavenson* v. *Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147; *Binkley* v. *Forkner*, 117 Ind. 176; *Henkle* v. *Dillon*, 15 Or. 610; *Atchison etc. R. R. Co.* v. *Moryan*, 42 Kan. 23.

RUSSELL *v.* WALKER.

[150 MASSACHUSETTS, 531.]

EXECUTIONS — LIABILITY OF JUDGMENT CREDITOR FOR ACTS OF OFFICER IN SELLING EXEMPT PROPERTY. — Where an officer, without specific directions, and without requiring indemnity, attaches property, and, proceeding upon his official responsibility, alone sells it under execution, though part of it at the time of sale is claimed as exempt, the judgment creditor, being present and neither assenting or objecting, may bid at the sale, or take the money derived from it without indorsing the correctness of the officer's action, or making himself responsible therefor to him.

EXECUTIONS — OFFICER'S RIGHT TO RECOVER OF PLAINTIFF WHEN COMPELLED TO PAY DAMAGES FOR UNAUTHORIZED ACTS. — The indemnity to which an officer is entitled, when there is any reasonable doubt as to the ownership of attached goods, may include damages, costs, and other legal expenses, including counsel fees, and if the officer neither demands

indemnity nor asks specific directions, but assumes the responsibility of executing his process in his own way, he cannot require indemnity when, subsequently to his action, a controversy arises, even if he is successful in the controversy.

B. W. Potter, *M. M. Taylor*, *and C. W. Wood*, for the plaintiff.

J. R. Thayer, *A. P. Rugg*, *and G. H. Mellen*, for the defendant.

DEVENS, J. The plaintiff, who was a deputy sheriff, seeks to hold the defendant responsible for the damages, costs, and legal expenses incurred in three actions brought against him, in consequence of the service of an execution in favor of the defendant against Maria D. Mann and Birney Mann. The property sold by the plaintiff had been attached by him on mesne process, but no demand therefor had been made, nor does there appear to have been any complaint of the plaintiff's proceedings, except such as arose from his levy of the execution. In an action brought against the plaintiff by Maria D. Mann, it has been decided that he wrongfully sold two tons of hay belonging to her which were by law exempt from execution. Judgment for the value of this hay has been rendered against him, with costs, which he has satisfied. For this expenditure he now seeks to hold the defendant liable.

It was held in *Bond* v. *Ward*, 7 Mass. 123, 5 Am. Dec. 28, that when there is any reasonable ground to induce an officer to believe that in making an attachment or seizure on execution he may mistake and expose himself to an action for damages by attaching or seizing goods wrongfully, he is entitled to insist on the creditor's showing him the goods, and also on being indemnified for any mistake in conforming to the creditor's direction. This decision was adopted and established as the statute law by the legislature in the Revised Statutes, chapter 97, section 18, and is now to be found in the Public Statutes, chapter 171, section 35, in these words: "If there is reasonable doubt as to the ownership of the goods, or as to their liability to be taken on the execution, the officer may require sufficient security to indemnify him for taking them." While such security is usually given by a bond of indemnity, a promise to indemnify the officer may be inferred, where direction is given him by the creditor to attach specific goods, or where in any other way he controls the officer in the execution of his process. In this the officer is the agent of the law, and not of the party suing out the process, unless such party

relieves him from responsibility by the direction he gives in regard to it.

The report shows that the defendant "was present at the sale; but as to the mode to be pursued in levying the execution, the plaintiff acted upon his official responsibility, and without any directions from the defendant." When he was about to sell the hay, Mrs. Mann claimed two tons thereof as exempt. The plaintiff was of opinion that he was not obliged, under the circumstances, to treat the two tons as exempt, and proceeded to levy his execution upon them, in the discharge of what he deemed to be his legal duty. This opinion, by the judgment on which he bases his claim, has been determined to be erroneous. While the officer declared his purpose to sell all the hay, including the two tons, in the presence and hearing of the defendant, the latter expressed neither assent nor objection thereto. The question was one peculiarly for the officer; it related, not to the ownership of the property, but to its liability to be taken on execution. The defendant did not concur in the error committed by the officer, but left him to deal in his own way with the matter. In any case of doubt or difficulty, it is intended that the responsibility shall rest upon the creditor; but where no such difficulty is suggested, it is to be presumed that the officer is ready to perform his duty for the compensation he receives, and take the necessary risks thereof: *Michels* v. *Stork*, 44 Mich. 2. Nor do we think that the fact that the defendant bid at the sale of the hay, bought some of it, and also received the avails of the sale in part satisfaction of the execution, decisive against him. The levy having been made by the officer, in the exercise of his own judgment, the creditor might bid at the sale, or take the money derived from it, without indorsing the correctness of the officer's action, or making himself responsible therefor to him. As between himself and the officer, he is not liable to the latter for the damages which have been recovered against him solely by reason of his own error: *Hyde* v. *Cooper*, 26 Vt. 552; *Evarts* v. *Hyde*, 51 Id. 183. The superior court was therefore, in the opinion of a majority of the court, warranted in finding for the defendant.

We are also of opinion that the plaintiff cannot recover for the costs and expenses of the actions unsuccessfully brought against him. Theoretically, the costs are a sufficient compensation to a prevailing party. Practically, this is not so, as many actual and reasonable expenditures, especially those for

counsel, are not included in the bill of costs. But in demanding the indemnity to which the officer is entitled, where there is any reasonable doubt as to the ownership of goods, or their liability to be taken on execution, that indemnity may include damages, costs, and other legal expenses, including counsel fees: *Cook* v. *Merrifield*, 139 Mass. 139; *Lindsey* v. *Parker*, 142 Id. 582. This indemnity may properly be demanded where there is reason to apprehend controversy or expensive litigation. If the officer neither demands this nor asks specific directions, but assumes the responsibility of executing his process in his own way, he cannot require it when, subsequently to his action, controversy arises, even if he is successful in the controversy: *Chamberlain* v. *Beller*, 18 N. Y. 115; *Sibley* v. *Brown*, 15 Me. 185, 186; *Richards* v. *Gilmore*, 11 N. H. 493.

Judgment on finding.

LIABILITY OF JUDGMENT CREDITOR FOR ACTS OF OFFICER. — The plaintiff in a suit is not liable in damages for the seizure and sale, by the officer to whom the writ is delivered, of property exempt from execution, unless he ratified or participated in the officer's misconduct: *White* v. *Stribling*, 71 Tex. 108; 10 Am. St. Rep. 732; but compare cases cited in note to the same.

SHERIFFS — AS TO A SHERIFF'S RIGHT TO DEMAND AN INDEMNITY: *Spangler* v. *Commonwealth*, 16 Serg. & R. 68; 16 Am. Dec. 548, and extended note. But if a sheriff undertakes to execute process without demanding an indemnity against any liability he may incur, he is liable for his negligent conduct which results in a loss to the creditor: Note to *Bond* v. *Ward*, 5 Id. 33, citing Freeman on Executions, secs. 254, 275.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

TURNER *v.* HART.

[71 MICHIGAN, 123.]

WATERS. —TO DETERMINE EFFECT AND ACTION OF WATER WHEN OBSTRUCTED OR PONDED in running streams, actual tests by observation and experience afford the most satisfactory testimony, and are controlling when brought in conflict with theoretical and instrumental measurements, however accurately and carefully taken.

WATERS. — WHEN PRESCRIPTIVE RIGHT TO FLOW LANDS OF ANOTHER IS CLAIMED, THE BURDEN OF PROOF is on the claimant to show that he has, for fifteen years at least, each year flowed the land to the height complained of, and that such use of the land has been adverse, uninterrupted, peaceable, open, and notorious.

ADVERSE POSSESSION. — TITLE OR RIGHTS IN LAND FOUNDED ON PRESCRIPTION originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner has granted the land or interest in the land so held adversely.

ADVERSE POSSESSION — STATUTE OF LIMITATIONS. — No one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine; hence the statute of limitations requires that an action shall be brought within fifteen years after the right first accrues to the adverse party.

NO PRESCRIPTIVE RIGHT IN LAND CAN BE CLAIMED until the claimant shows that the acts constituting the adverse user injured the complaining party, and gave him, or those claiming under him, a right of action.

INJUNCTIONS — JOINDER OF PARTIES. — INJUNCTIVE RELIEF MAY BE GRANTED against the unlawful maintenance of a dam, though the complainants in the suit are differently affected, at least in degree, by the act complained of. This is more especially true when objection is not made by special demurrer, and the parties proceed to a hearing.

EQUITABLE RELIEF WILL NOT ALWAYS BE GRANTED as a matter of course when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative value of the property affected,

and other considerations which may present themselves under various circumstances, ought to be weighed, and relief afforded or withheld, as equity and good conscience require.

INJUNCTION — NUISANCE — JOINDER OF PARTIES. — The unlawful maintenance of a dam practically destroying three hundred acres of agricultural land, and which is a continuing nuisance as to the several complainants, may be enjoined and abated in a suit in which they all join in petition for relief.

Cahill and Ostrander, for the complainants.

Hammond and Lee, and Isaac Marston, for the defendants.

CHAMPLIN, J. The bill of complaint in this cause was filed October 14, 1884, to enjoin defendants from damming or obstructing the waters of the Grand River to the extent that it will set back the waters of the Grand and Cedar rivers so as to overflow their banks, and flood complainants' land, and prevent the natural flowing off and subsidence of the waters of said rivers in the season of high water, and to compel the defendants to remove and abate their dam across Grand River, and to so construct and maintain the same as not to flood complainants' lands, or any part thereof.

The bill sets forth that complainants are the owners in severalty of the lands therein specifically described as belonging to each of said owners, and that they lie along and adjacent to the Cedar River, so called; that the defendants are the owners of a dam across Grand River, in the city of Lansing, and usually known as the North Lansing Dam, and which they have maintained for three years and upwards, and are now maintaining at a head of ten feet, causing the waters of the river to rise to a great height, and set back into the Cedar River, an affluent of the Grand River, and to overflow the banks of the Cedar River, so that large portions of complainants' lands have been for three years overflowed, and are being again threatened with being overflowed and completely submerged whenever the waters of said rivers are at their usual and ordinary height, to the great injury and detriment of complainants.

The bill further alleges "that but for the maintenance of said dam no part of your orators' or your oratrix's lands would be overflowed or submerged by the waters of said Cedar River, except small portions thereof, and for brief periods, during unusual floods and high water, but by reason of said dam the waters of said river are impeded and held back, and have been and are caused to stand for long periods of time,—that

is to say, during the seasons of 1882 and 1883, during the months of March, April, May, June, and July in each year, and during the season of 1884, during the months of March, April, May, and June,—over your orators' and your oratrix's lands hereinafter described, whereby they have wholly lost and continue to lose the rents, issues, and profits of said lands, to their great damage; that your orators' and your oratrix's lands are all tillable lands, fit for cultivation, except for the flooding of the same as aforesaid, but by the reason of the maintenance of said dam, and the flooding in consequence thereof, the said lands are rendered untillable and useless for the purpose of cultivation."

The bill also sets forth the particular portions of land belonging to the complainants which are flooded.

Nine of the defendants answered, and admitted the existence of the dam as stated in the bill, and that they were owners thereof, and as such interested in the water-power created by such dam. They aver that the dam was constructed over forty years ago in pursuance of lawful right and authority for that purpose duly acquired from the state of Michigan, and has ever since that time been kept up and maintained to the same height that it is now kept up and maintained; that complainants acquired their land long after the erection of the dam, and subject to the rights of the owners thereof, and their grantees, and deny that they have kept up a dam at a height of ten feet, or any other height which is unlawful or contrary to the rights of complainants, and they deny that the lands of complainants are overflowed by reason of said dam, and they deny that they have injured complainants or threaten any injury to them by reason of maintaining such dam. A demurrer clause is added, praying the same benefit as if they had demurred for want of equity.

The only authority granted by the state for building a dam across Grand River at or near where this dam is located is that conferred by act No. 98, Laws of 1843, in which John W. Burchard, his heirs and assigns, were authorized to build a dam across the Grand River, in Ingham County, on section No. 9, township 4 north, range 2 west, "not exceeding eight feet in height." It was provided in that act that "nothing herein contained shall authorize the person or persons above mentioned, or their heirs or assigns, to enter upon or flow or injure the lands of any other person without the consent of such person."

The defendants did not attempt to deduce their rights from Burchard, or from the grant by the state to him. It was wholly immaterial for them to do so, since the complainants do not deny the right of defendants to maintain a dam across Grand River, but deny their right so to construct or maintain it as to cause the water to set back and overflow their lands. The state did not authorize them to do this without the consent of the owners.

There was testimony which tended to show that a dam has been maintained at the point where the present dam is located since the fall of 1843; that in 1875 the greater portion of it was swept away, and it was that year rebuilt to a height of seven and a half feet; that after that date, and until 1881, the owners had been in the habit of increasing the head of water afforded by the dam, by the use of flash-boards, from twelve to eighteen inches in height. It was shown that flash-boards had always been used during certain seasons of the year upon the old dam prior to the year 1875. In 1881, repairs were made upon the dam by increasing its permanent height twelve inches, intending thereby to do away with the use of flash-boards. The effect of this has been to hold the water more uniformly than it was by the use of flash-boards. The dam was also made generally tighter, and less loss occasioned by leakage.

The testimony shows that the complainants had owned the several parcels of land described in the bill as belonging to each individual from eight to twenty years; that they had made improvements thereon, and brought the land under cultivation, and raised crops thereon; had put down drains by which the waters were drained into Cedar River, and had experienced no difficulty from high water or flooding or overflow until the repairs were made upon the dam in 1881; and from that time the water has been set back upon their lands, causing a loss of crops, the killing of native trees, and the destruction of the land for agricultural purposes. The proof is ample and convincing that, since the repairs made in 1881, the water has been, on an average, a foot higher in Cedar River along complainants' lands than it was before, destroying the drainage, and causing the water to set back and soak up the soil of complainants' lands, and rendering them wholly unfit for cultivation.

Testimony was introduced of levels taken of the dam up the Grand and Cedar rivers for the purpose of showing that the

waters in Cedar River were not affected and raised as far up the river, nor to such height, as claimed by the complainants. Owing to the impossibility of arriving at precisely accurate results by the use of instruments, running over a line six miles in extent, involving a great number of stations, and the adjustment, taking, and registering of levels thereat, and the many different circumstances, explainable and unexplainable, which affect the action of water when obstructed and ponded in running streams, actual tests by observation and experience afford the most satisfactory testimony upon which to rely in determining the results from such obstruction: *Decorah W. M. Co.* v. *Greer*, 58 Iowa, 86; *Brown* v. *Bush*, 45 Pa. St. 61.

Every author treating upon the subject of hydrodynamics acknowledges and points out the difference between theoretical and actual tests, and, in advancing practical rules, modifies the theoretical to correspond as nearly as possible to actual observation and experience. We think the observation and experience of the witnesses introduced by complainants is controlling when brought in conflict with instrumental measurements, however accurately and carefully taken.

Testimony was also introduced showing that the actual structure of the dam in the river varied from seven to sixteen feet in height, and also that, as at present constructed, it is not so high as the dam was prior to 1881, including the flash-boards. Notwithstanding all this, the proof is positive that complainants' lands were not injured by the dam, which included the flash-boards, prior to the year 1881.

The defendants sought to account for this upon two hypotheses: 1. By the clearing up of the country, and by the construction of drains, the waters, draining large tracts of country, flowed off into the Cedar and Grand rivers more quickly, and thus the water was raised to a greater height than had hitherto been ordinary by natural causes; 2. That the average rain-fall had been very much greater since 1881 than before, and this caused naturally a higher stage of water.

Testimony was offered in support of both these propositions, but I do not think either of them was established by the testimony introduced. Experience has shown, what would naturally be expected to follow, that as the country is cleared up, improved, and drained, the streams, which are the natural conduits for surface drainage, become materially lessened in volume, owing partly to the greater facility for conducting the surface water into them after rain-fall, and partly from

the greater quantity evaporated, and also the greater quantity taken up and absorbed by the drier soil caused by drainage.

The average rain-fall, as shown by the table introduced in evidence of measurements taken by Professor Kedzie at the agricultural college, has been greater since 1879 than previously. The dam was rebuilt in 1875. From that date to 1880, inclusive, the average rain-fall for the six years was 33.15 inches. The succeeding six years shows an average of 35.81 inches.

Witnesses introduced on the part of defendants also testified, from their observation, to there being a greater volume of water flowing in Grand River since 1881 than before; but to what extent the volume was increased from natural causes, and whether such increased flow had any effect in setting the water back upon complainants' lands, was not shown, and was left to conjecture; while the evidence is positive that during the week, when the mills at North Lansing were using the water from the dam, after Monday the water was drawn down in the Cedar River materially, and by Saturday night it set back no higher than it did prior to 1881; but while the gates were shut from Saturday night to Monday morning, their lands were again flooded, the difference in water level being about one foot, and in summer time, when there was low water, the variation would be as great as two or three feet.

No grant of the right of flowage of the lands of complainants is claimed. The defense rests upon rights acquired by prescription; and in such case the burden of proof is upon the defendants to show that they have, for a period of fifteen years at least, each year flowed complainants' lands to the height complained of and established by their proofs, and that such use of complainants' lands by flowage has been adverse, uninterrupted, peaceable, open, and notorious. No testimony was introduced to show that the effect of the old dam, with or without the flash-boards, was to set the water back, and to flow over complainants' lands to the height it has since 1881, nor to show that it so flooded the land as to interfere with or destroy the crops of complainants prior to that time, for a period of fifteen years. This branch of the defense has utterly failed for lack of proof.

It was claimed on the part of counsel for defendants that we should apply the rule adopted in Massachusetts, and laid done in *Cowell* v. *Thayer*, 5 Met. 253, and approved in *Ray* v. *Fletcher*, 12 Cush. 200, that the height to which a mill-owner

will have a prescriptive right to maintain the water will depend upon the height of the dam by which he has raised it, and not upon the height such dam has set the water back, and flowed the land in question during the prescriptive period; and therefore, if he repairs the dam without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, and thereby keeps the water more constantly and at a greater height than before, it is not a new use of the stream, but a use conformable to his prescriptive right.

We cannot accede to this doctrine. It is antagonistic to the principle which underlies the doctrine of prescription. Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely. But no one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine, and hence the statute of limitations requires that an action shall be brought within fifteen years after the right first accrues or the adverse entry. The defendants, therefore, acquired no right by prescription to the lands in question until they showed that the acts which constituted the adverse user injured complainants, and gave them, or to those under whom they claim title, a right of action: *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Smith* v. *Russ*, 17 Wis. 234; 84 Am. Dec. 739; *Sabine* v. *Johnson*, 35 Wis. 185; *Burnham* v. *Kempton*, 44 N. H. 90; *Griffin* v. *Bartlett*, 55 Id. 123; *Mertz* v. *Dorney*, 25 Pa. St. 519.

It is urged that relief should be denied to complainants for the reason that they have each separate interests, and are differently affected, at least in degree, by the act complained of, and are therefore improperly joined in this suit. As the bill does not ask for an accounting, but only for injunctive relief, we think it is maintainable under our former decisions: *Scofield* v. *Lansing*, 17 Mich. 437; *Middleton* v. *Flat River Booming Co.*, 27 Id. 533; *Robinson* v. *Baugh*, 31 Id. 290; *Fox* v. *Holcomb*, 32 Id. 494; *Cobb* v. *Slimmer*, 45 Id. 176. More especially are we inclined to so hold where the objection was not taken by special demurrer, but the parties have taken their proofs, and proceeded to a hearing thereon.

The fact that there are several complainants praying the same relief does not materially affect the propriety of the

decree: Story's Eq. Pl., sec. 544, note 2. Nor do we experience any difficulty in granting relief. Although it is true that the lands situated lower down the Cedar River are flooded to a greater extent than those farther up, yet if complete relief is given to the one situated lowest down, those farther up must of necessity be relieved.

We think the complainants have made a case by their proofs, and the only serious difficulty we have had to contend with is, whether we should grant the relief prayed. It is not always a matter of course to grant relief in such cases, in a court of equity, when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative values of the properties affected, and other considerations which may present themselves under the varying circumstances, ought to be duly weighed, and relief afforded or withheld, as equity and good conscience require: *Robinson* v. *Baugh*, 31 Mich. 297, 298; *Fox* v. *Holcomb*, 32 Id. 494; *Cobb* v. *Slimmer*, 45 Id. 176; *Hall* v. *Rood*, 40 Id. 46; 29 Am. Rep. 528; *Edwards* v. *Allouez Mining Co.*, 38 Mich. 46; 31 Am. Rep. 301; *Gilbert* v. *Showerman*, 23 Mich. 448.

The testimony of complainants shows that there are about three hundred acres of land belonging to them, which are flooded, and practically destroyed for agricultural purposes by reason of defendants' dam being maintained as at present; that such land is worth about fifty dollars an acre, and its annual rental value is about three dollars an acre. We have the testimony of defendants, who estimate the value of their mill property at one hundred and fifty thousand dollars, and they gave testimony tending to show that, if the dam was reduced to the height it was before the repairs of 1881, it would depreciate their property one half, or seventy-five thousand dollars. Upon these estimates, we have a loss or depreciation upon one side of fifteen thousand dollars, and upon the other, of seventy-five thousand dollars. I think both sides have estimated their loss rather large. It appears to me especially that the depreciation in the value of the mill property is greatly overestimated. Some of the mills are at the present time supplied with steam-power to aid them in case of low water.

The testimony of defendants shows that, prior to the permanently raising of the dam in 1881, the mill-owners got along very well with the dam at the height it then was, with the aid of flash-boards, and that they had as much power as

they now have; and that, should this method be resumed, the mill-owners would have all the power they had enjoyed prior to 1881.

In view of the practical destruction of three hundred acres of land or over, be its value what it may, and the consequent, and weekly, and perhaps daily, recurring injury to each of the complainants, for which they severally would have a right of action, presenting a multiplicity of suits and vexatious litigation, it appears to us to be just and equitable that defendants should be decreed to abate and remove the top of their dam so as to lower the structure twelve inches, and that they should perform such decree on or before the first day of December next, and that they should be enjoined from raising the water at their said dam so as to cause the water to set back and overflow the lands of complainants, or either of them, or to such height as will cause the water to set back and percolate through the soil of complainants, or either of them, to a greater extent than was customary or usual prior to the time repairs were made upon said dam in 1881.

The decree of the circuit court for the county of Ingham must be reversed, with costs of both courts, and the cause remanded to that court, with instructions to enter a decree in said cause in favor of complainants and against defendants, in accordance with the foregoing opinion.

ADVERSE POSSESSION. — To render possession adverse, it must be actual, visible, continuous, notorious, distinct, and hostile, and of such a character as to unmistakably indicate an assertion of claim of exclusive ownership by the occupant: *Doyle* v. *Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and particularly note 342, 343.

EQUITY JURISDICTION. — The general rule is, that where a party has adequate remedy at law, courts of equity will not entertain jurisdiction: *Sherman* v. *Clark*, 4 Nev. 138; 97 Am. Dec. 516, and cases in note.

WATERS. — BACKING WATERS BY DAMS, etc., upon the lands of another, is an injury actionable at law: *Sullens* v. *Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501, and cases cited in note.

STEWART *v.* JEROME.

[71 MICHIGAN, 201.]

STATUTE OF FRAUDS — ORAL PROMISE TO PAY DEBT OF ANOTHER. — An oral promise by a mortgagee to pay the debt of his mortgagor, given in consideration of a forbearance to attach property of the mortgagor not included in the mortgage, is void under the statute of frauds, although the mortgagee converted such property to his own use.

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER. — There must be a consideration to support every promise, whether evidenced by writing or not, and where the promise is to answer for the debt, default, or misdoing of another, such promise must be evidenced by writing.

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER. — A verbal promise to pay the debt of another, given in consideration of a forbearance to attach property of the debtor, to which neither the promisor nor the creditor has any right, lien, or title, is void under the statute of frauds.

H. C. Wisner, for the appellant.

Larned and Larned, and D. Augustus Straker, for the plaintiffs.

CHAMPLIN, J. This suit was commenced by declaration which consisted of the common counts in *assumpsit*.

The defendant demanded a bill of particulars, and one was served, which consisted of several items, from May 2 to June 5, 1884, of oats, amounting to $395.66, and a statement that the goods were sold and delivered to Joseph H. Morris for feed for his livery horses at his stables on Michigan Grand Avenue, at Detroit; that said Morris owed defendant ten thousand dollars, and to secure the same defendant held a chattel mortgage on Morris's horses, harnesses, and other property in said stables, dated June 4, 1884; that said mortgage included no goods or stock of Morris acquired by him after the date thereof, and that Morris purchased and had in his stables stock, goods, and property not covered by said mortgage to the amount of four thousand dollars, and on or about June 20, 1884, said Morris absconded, with intent to defraud his creditors; that said Jerome took possession of all of said horses, coupés, carriages, harnesses, and other property, including stock and property not included in his mortgage, and more than sufficient to satisfy plaintiff's said demand, which, with the mortgaged property, was liable to attachment; that of the above-written account, all being past due and unpaid, two hundred dollars' worth of the oats were at the time Morris absconded then in the stables, and not fed out, and were purchased fraudulently,

and were repleviable by plaintiffs, on the ground that they were obtained by fraud by said Morris, and said plaintiffs intended to proceed to replevin said two hundred dollars' worth of oats, and intended to proceed by attachment against the residue of the property taken by defendant to satisfy his mortgage, and not covered by it; and the defendant, well knowing all the above premises, and in order to prevent said plaintiffs from enforcing payment of their just debt and lien by attachment and replevin, did promise and agree with said plaintiffs that if they would forbear to enforce their said claims he, said defendant, would assume and pay said debt of said plaintiffs, and relying on said promise, plaintiffs did so forbear, and took no steps to replevin or attach or attempt collection of their debt, and have hitherto forborne until the commencement of this suit, relying on his, defendant's, promise to pay said debt. The defendant pleaded the general issue.

Upon the trial of the cause, the plaintiffs, against objections made by counsel for defendant that the proof offered was inadmissible under the pleadings, introduced evidence tending to prove the indebtedness of Morris to plaintiffs, the execution of the chattel mortgage by Morris to defendant, the departure of Morris, and the possession taken by defendant of the whole stock and property in the stable, and the promise of the defendant. The plaintiffs are copartners, composed of Daniel Stewart, the father, and his son, Andrew T.

As soon as Daniel Stewart had learned that Morris had left the city, he went to the stables on Michigan Grand Avenue, and found defendant's servants in possession; and one of them informed him that defendant wished to see him immediately, and took him in a buggy to the office of defendant, where he had a conversation with defendant, as follows:—

"State what that conversation was fully. A. He asked me how much Mr. Morris owed me, and I told him he owed me $395.66, at the same time handing him the bill. He looked at it a moment, and turned around to me, and asked me what I was going to do, and I told him I was going to replevin my oats and attach other property to get my money; that I could not afford to lose it.

"Q. Now, at that time, what was the fact of your intending to attach any particular property in the stable that he had recently been purchasing? A. Mr. Morris offered me, a few days before he left, a span of large bay mares, and offered me them cheap, tried to persuade me very much to buy them, and

also a two-seated wagon that Morris told me was not included, and Jerome had no business with.

"Q. Then you intended to attach what,—these horses and the wagon, you say, and the open account? A. Yes, sir.

"Q. Now, Mr. Jerome asked you what you were going to do, and you told him you were going to replevin your oats, and attach some other property, and get your debt. What did he say to you? A. Be quiet, do nothing, and I will pay you; that is it exactly.

"Q. What else did he say? A. That my bill was similar to a supply-man on a railroad,—when the railroad broke down, the supply-man had to be paid whoever was paid, and he would pay me.

"Q. What did you say to that? A. Well, I agreed to it."

He further testified that he did not replevin or attach, because he relied upon Mr. Jerome paying him, and was satisfied he would; that he reported to his son the interview with Mr. Jerome, and he was not satisfied with it; and they both went the second day after to see Mr. Jerome, when nearly the same conversation was had as before, Mr. Jerome agreeing to pay them if they "stood quiet," and would wait six months, to which plaintiffs agreed; at the end of which time they called upon him, when he offered two hundred dollars in cash to settle the bill, or if they would wait ten months, he would pay the whole face of it. The plaintiffs then agreed to wait ten months, and directed an entry to be made on their books so they would know when the ten months was up. At the end of this time, plaintiffs again called upon defendant for payment, and he was not yet ready; "complained that he had sold his business to Edmunds, but got very little or no money, and he was scarce of money."

Later, they called again, and the plaintiff Daniel Stewart testified to the conversation that then occurred, as follows: "My son went to him, and asked him what was the reason he would not pay us. Why didn't you let us replevin, and attach at once, and get our money? Jerome got a little wrathy, and he said that unless he was willing to pay the bill we could not get it any more than we could get the paint off the wall."

The defendant introduced no testimony, and the plaintiffs recovered.

The defense to the action is placed upon two grounds: 1. That the promise of defendant is void under the statute which

enacts that every special promise to answer for the debt, default, or misdoings of another person shall be void, unless some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized; 2. If not void, no recovery can be had upon such promise under the common counts in *assumpsit*.

This clause of the statute of frauds has often come before this court for consideration. In *Corkins* v. *Collins*, 16 Mich. 478, the plaintiff sued Collins on a verbal promise to pay a board bill and money lent, due from one James Sykes. The consideration was the release of certain trunks, supposed to be held for the debt. The defense was the statute of frauds. Mr. Justice Campbell said: "Such a release of a valid lien or claim would be a sufficient consideration for a written promise; for if a consideration passes from the promisee, it usually makes no difference to whom it passes. . . . . It is not pretended that an extension of time, or any other agreement involving no release of property or extinguishment of liability, if made in favor of the principal debtor, would authorize the verbal promise of a third person to pay the debt to be enforced. But a distinction is sought to be drawn, where property is released or given up to the debtor. There is no obvious reason for any such distinction. The law puts all valuable considerations on the same footing. . . . . When, by the release of property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor; and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is, therefore, in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing."

In *Calkins* v. *Chandler*, 36 Mich. 320, 24 Am. Rep. 593, it was held that an agreement to extend the time of payment, and forbear to sue a third person, who was plaintiff's debtor, was a sufficient consideration for defendants' promise to pay. And this was because the promise of defendants to pay the debt of such third person was at the same time, when paid, to apply on an indebtedness that was to accrue against themselves, and was consequently a promise to answer for their

own debt. And Chief Justice Cooley, in that case, quotes with approval from the opinion of Chief Justice Shaw in *Nelson* v. *Boynton*, 3 Met. 396, 37 Am. Dec. 148, as follows: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself. But where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

In *Curtis* v. *Brown*, 5 Cush. 488, Shaw, C. J., said: "It is no sufficient ground to prevent the operation of the statute of frauds that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage had not also directly inured to the benefit of the defendant, so as, in effect, to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant. In such cases, although the result is, that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question."

The doctrine was declared and acted upon in several other cases in that state: *Fish* v. *Thomas*, 5 Gray, 45; 66 Am. Dec. 348; *Jepherson* v. *Hunt*, 2 Allen, 417; *Furbish* v. *Goodnow*, 98 Mass. 296; *Ames* v. *Foster*, 106 Id. 400; 13 Am. Rep. 343; *Wills* v. *Brown*, 118 Mass. 137; *Fears* v. *Story*, 131 Id. 47.

The same doctrine is recognized in Wisconsin: *Clapp* v. *Webb*, 52 Wis. 638; and in Indiana: *Crawford* v. *King*, 54 Ind. 10; *Palmer* v. *Blain*, 55 Id. 11; and in Vermont: *Whitman* v. *Bryant*, 49 Vt. 512.

In New York, the exposition of this section has been somewhat variant, as will be seen by reference to *Leonard* v. *Vredenburgh*, 8 Johns. 29; 5 Am. Dec. 317; *Mallory* v. *Gillett*. 21 N. Y. 412; *Brown* v. *Weber*, 38 Id. 187; *Ackley* v. *Parmenter*, 98 Id. 425; 50 Am. Rep. 693. The latest enunciation of the principles which should be applied in cases coming under this provision of the statute in that state is by Mr. Justice Finch, in *White* v. *Rintoul*, 108 N. Y. 222. He reviews the leading

decisions in New York above cited, and says they "have ended in establishing the doctrine in the courts of this state which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor."

The difficulty in applying the doctrine, and one which has given rise to much seeming conflict in the authorities, lies in the failure to distinguish between the consideration for the promise of a third person to pay the debt of another, and the promise itself, whether it be to answer for the debt of another, or to pay or perform his own obligation. There must be a consideration to support every promise, whether it be evidenced by writing or not; and where the promise is to answer for the debt, default, or misdoing of another, the statute requires that such promise must be evidenced by writing.

Under the undisputed testimony, there can be no doubt but that, in consideration of Mr. Jerome's promise, the plaintiffs relinquished an advantage which they had for securing their own debt. The oats and the horses and buggy, not covered by Jerome's chattel mortgage, were liable to be attached at the suit of the plaintiffs. This is a sufficient consideration for the promise; but the difficulty is, that this advantage, which the plaintiffs forebore to exercise or appropriate, did not inure to the benefit of the defendant. The plaintiffs had no lien which they released. They had no title to any of the property which they transferred to defendant. It was alleged in the notice attached to the bill of particulars that the plaintiffs owned the oats which they had delivered to defendant, because they were obtained by fraud, but there is no evidence which supports such claim.

It is true that by forbearing to attach such oats and other property it was left in the hands of Jerome, and it may be inferred that he converted such property to his own use; but he derived no right or title thereto from plaintiffs, and is still liable to account to or pay for such property to Mr. Morris, or the true owner, whoever he may be. There was nothing, therefore, which inured to the benefit of defendant received from plaintiffs which supports a new promise or agreement to

assume and pay the amount as an original debt from defendant to plaintiffs.

There is nothing in the facts or circumstances of this case to distinguish it from that of *Waldo* v. *Simonson*, 18 Mich. 345, and we think this case is ruled by that. Had the title to the oats in the bin remained in the plaintiffs, and the defendant under his promise had appropriated and fed the oats to his animals, the case would have been different; or had the plaintiffs attached first, and then, in consideration of the promise, released, so that the rights of possession acquired by the attachment passed to defendant, it would have afforded a consideration for the promise to pay the debt as his own within the authorities.

The objection to the pleadings stands or falls with the ruling upon the question as to the promise being void under the statute of frauds. If the promise had been held good as an original promise to pay defendant's own debt, the common counts would have been sufficient, and a recovery could have been maintained under the count stated.

The judgment must be reversed, and a new trial granted.

STATUTE OF FRAUDS. — As to what cases fall within and what without the rule requiring promises to pay the debt of another to be in writing: Note to *Packer* v. *Benton*, 95 Am. Dec. 251–263. A verbal promise by a widow to pay her husband's debt "if the creditors" of the estate "would thereafter furnish her goods on credit," which debt was not discharged, but remained a claim against the husband's estate, is void under the statute of frauds: *Ruppe* v. *Peterson*, 67 Mich. 437. So a promise by L. to G., that if G. would forbear to sue H. for a debt, he, L., would pay the debt, is void under the statute of frauds: *Gump* v. *Halberstadt*, 15 Or. 356.

But an oral promise to pay the debt of another, made upon a valid consideration, passing at the time to the promisor, is a new and original undertaking, not within the statute of frauds: *Lookout Mountain R. R. Co.* v. *Houston*, 85 Tenn. 224; *Helt* v. *Smith*, 74 Iowa, 667; *Waters* v. *Shafer*, 25 Neb. 225. So a promise made at the request of the assignor by the assignee of a contract, who holds the same as security for advances agreed to be made in aid of its performance, to pay a mechanic the amount due him for work on the contract from the surplus moneys received, is an original promise not within the statute of frauds: *Mitts* v. *McMoran*, 64 Mich. 664; for it seems that a promise to pay a debt of another antecedently contracted, where the primary debt still subsists, is original, and not within the statute of frauds, although not in writing, when it is founded upon a new consideration moving to the promisor and beneficial to him, and when by the promise he comes under an independent duty of paying, irrespective of the principal debtor: *White* v. *Rintoul*, 108 N. Y. 222. A direct promise to an agent of a commercial house, who is in possession of the goods of an insolvent firm in satisfaction of a debt of his principal, made to an attorney of another creditor of such insolvent firm, to pay a claim held by such attorney against said firm if he will not

disturb him in the possession of the goods, is not a promise to pay the debt of another, within the meaning of the statute of frauds: *Rogers* v. *Empkie Hardware Co.*, 24 Neb. 653.

PROMISE TO PAY DEBT OF ANOTHER. — The objection that the contract sued upon is an agreement that should be in writing, because it is a promise to pay the debt of another, must be presented by an exception to the ruling of the court below, either in admitting or excluding evidence, or giving or refusing to give instructions, or by a demurrer: *Hawley* v. *Dawson*, 16 Or. 344.

PEOPLE *v.* LENNON.

[71 MICHIGAN, 298.]

CRIMINAL LAW. — IN CASES OF SELF-DEFENSE the jury cannot determine the standard of courage, or whether the party attacked, in what he did in his defense, acted cowardly, and therefore without warrant. There is no question of courage or cowardice in such cases.

CRIMINAL LAW. — IN CASES OF SELF-DEFENSE THE QUESTION TO BE DETERMINED IS, Did the accused, under the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or of great bodily harm, and that it was necessary to do what he did, in order to protect himself? If so, he is excused, and it can make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted therewith, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm.

CRIMINAL LAW. — IN CASES OF SELF-DEFENSE, the physical and mental make-up of the accused, and his experience in danger, are to be considered as bearing upon the honesty of his alleged belief of personal danger, upon which he bases his right to act; but in such consideration the fact that he is weak, timid, and cowardly by nature is to be weighed in his favor, and not against him.

Moses Taggart, attorney-general, and Henry Hoffman, prosecuting attorney, for the people.

Brown and Packard, for the respondent.

MORSE, J. Lennon was convicted in the circuit court for the county of Mackinac of an assault upon one Herbert Ryerse, with intent to do said Ryerse great bodily harm less than the crime of murder. There was another count in the information filed against him, charging him with an assault with intent to commit the crime of murder. By the verdict he was acquitted upon this count. The errors assigned relate to the charge of the court.

The court charged the jury upon the subject of self-defense, among other things, as follows: "And if you believe, from the evidence in this case, that at the time of the alleged assault

the defendant, Lennon, was first attacked by the complaining witness, and that the circumstances, as they then appeared to him, were such as in reason would and did justify or induce in his mind a probability of a belief that he was to receive from Ryerse some great bodily harm, and in doing what he did he was acting under the instincts of self-preservation, he would not be guilty of the offenses charged in this case. But in that connection you ought to remember that human life is not to be lightly regarded. A man cannot avail himself of this fact in order to escape the penalty of such acts as were provoked by his own unlawful act. And if a man kills or attempts to kill him, or unlawfully attacks or injures another, through mere cowardice, or under circumstances not warranted to induce in his mind a reasonable fear of injury, and which would be considered to arise from a want of courage, or an unwarrantable cowardice under the circumstances, situated as the party attacked was, and as the circumstances then presented themselves to him, the law of self-defense would not apply, and would not justify such an act."

I do not think it proper that a jury should be authorized to determine the standard of courage in a case of self-defense, or whether the party attacked, in what he did in his defense, acted cowardly, and therefore without warrant. There is no question of courage or cowardice in the case. I am aware that the rule laid down by the trial court has been sustained in some cases, collected and reported in Horrigan and Thompson's Cases of Self-defense; but the doctrine, or the reason given for it, is not in accord with the principles of self-defense, as now almost universally held and enunciated by the courts of this country.

The question to be determined is, Did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or great bodily harm, and that it was necessary to do what he did, in order to save himself from such apparent, threatened danger? If so, the inquiry is ended. It can and ought to make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted with broils or assaults, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm. The fact of his physical and mental make-up, and his experience in danger, are to be considered, it is true, as bearing upon the honesty of his alleged

belief, upon which he bases his right to act; but in such consideration the fact that the accused is weak, timid, and cowardly by nature is to be weighed in his favor, and not against him. To hold otherwise would be to set at naught and to rule at variance with the well-known laws of human nature, and to place the weak and timid at the mercy of the strong. It is bad enough to be constitutionally a coward, without having the law also declare that the coward has no right to act in self-defense until he reaches the point where a man of average courage would have defended himself in the same manner, and to have the *quantum* of courage necessary in such cases determined by a jury sitting in safety and cool blood, listening to what must always be a tame recital of the facts compared to their appearance at the time they occurred.

Upon the argument I was inclined to the belief that the error committed was not a prejudicial one, as from a hasty perusal of the record I had formed the impression that the respondent, in his own statement, did not claim to act in self-defense, but that he fired the pistol in the air purposely with the intention of scaring Ryerse away, and not with any idea of hitting him. But a careful examination of the record discloses that the claim of self-defense was made and relied upon by the defendant and his counsel.

It is also claimed that the court erred in instructing the jury that the respondent could be convicted of an assault with intent to do great bodily harm in case the jury found that the assault was made unlawfully, without malice aforethought, but with an intention to take life, suddenly formed under such circumstances of provocation that, if death had ensued, the killing would have been manslaughter. As we view the testimony appearing in the record, there is no necessity of examining this claim of error. We find no evidence in the case warranting a conviction of the respondent of any greater offense than assault and battery, if he was guilty of any offense. Ryerse was not hit by a bullet, and there is no testimony showing that respondent meant to shoot him. Ryerse was not hurt to speak of, and was more to blame than defendant.

On the evening of July 4th, it is admitted and undisputed that he stopped in front of respondent's residence, in company with a squaw prostitute, and then deliberately and grossly insulted Lennon in the presence of his family by remarks in a loud tone to the prostitute, using language unfit to be here repeated. Most men would have felt justified in chastising such an

obscene brute at the time, and the infraction of the law in so doing would have been satisfied by a light penalty.

There was testimony tending to show that there had been trouble for some time between the Ryerse family and Lennon. Lennon claimed that for a long time he had been the subject of many indignities and outrages on the part of Ryerse and his father, and others who were in league with them. This last insult was too much, and Lennon felt that he could no longer submit to such treatment. He therefore, on the morning of July 5th, stopped Ryerse as he was passing his house, and expostulated with him; asked him, "How long are you going to torment me in this way?" Ryerse gave him an insulting answer, which led to blows. Ryerse claims Lennon struck first, and the respondent swears that Ryerse assaulted him, backing him towards his gate, and "punching" him in the the face. Lennon testifies that he was sickly, and scared; that he considered his life in danger, as he was so weak that he felt that one good blow, "the least thing in the world, would lay me out; it would knock me dead." He claims he fired his pistol the first time to scare Ryerse, but as Ryerse kept on afterwards following him up and striking him, he struck Ryerse on the ear with the revolver, and it went off the second time accidentally. Whether Ryerse first assaulted Lennon or Lennon first struck Ryerse on this morning of July 5th is immaterial. At the best, Lennon was only guilty of assault and battery, and he has now been sufficiently punished for that offense.

The judgment and sentence against him is vacated and set aside, and he will be forthwith discharged from any further custody or restraint in this case.

CRIMINAL LAW — SELF-DEFENSE. — As to when homicide is deemed justifiable upon the ground of self-defense, and when not: Note to *Shorter* v. *People*, 51 Am. Dec. 293; compare *Spencer* v. *State*, 77 Ga. 155; 4 Am. St. Rep. 74, and note; *Tiffany* v. *Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775, and note; *Alexander* v. *State*, 25 Tex. App. 260; 8 Am. St. Rep. 438; *Bonnard* v. *State*, 25 Tex. App. 173; 8 Am. St. Rep. 431; *Meuly* v. *State*, 26 Tex. App. 274; 8 Am. St. Rep. 477; *High* v. *State*, 26 Tex. App. 545; 8 Am. St. Rep. 488; *State* v. *Ellis*, 101 N. C. 765; 9 Am. St. Rep. 49.

There can be no crime where a killing is committed in self-defense, and the *onus probandi* is upon the prosecution to show to the jury, beyond a reasonable doubt, the absence of self-defense, when it is pleaded by the accused: *People* v. *Coughlin*, 65 Mich. 704; compare *Brown* v. *State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note. To establish self-defense, the defendant must show that he did not bring on the difficulty, was in imminent danger as to life or body, and that there was no reasonable mode of escape except by killing his

assailant; but the *onus* is not upon the defendant to negative fault upon his own part: *Cleveland* v. *State*, 86 Id. 1. The plea of self-defense admits the killing, and the evidence must be very plainly in a defendant's favor before the appellate court will set aside a verdict of guilty, where the only defense was justifiable homicide: *Biemel* v. *State*, 71 Wis. 444.

The duty of one who is assailed to retreat is imperative, provided he can do so with safety to his life and person: *Brown* v. *State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note; *Blackburn* v. *State*, 86 Ala. 595; *Poe* v. *State*, 87 Id. 65; and a charge which invokes the law of self-defense, but ignores the duty to retreat, is erroneous: Id.; *Cribbs* v. *State*, 86 Ala. 613; *Fallin* v. *State*, 86 Id. 13.

Trespass is not such a provocation as entitles one to kill the trespasser, and justify the homicide on the plea of self-defense: *State* v. *Shippey*, 10 Minn. 223; 88 Am. Dec. 70, and note; *People* v. *Dunne*, 80 Cal. 34. So a land-owner may not provoke a difficulty with a trespasser, in which he is obliged to kill the trespasser in self-defense: *Tiffany* v. *Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775.

So one cannot justify a killing on the ground of self-defense merely because the deceased was a bad and quarrelsome man: *State* v. *Hardy*, 95 Mo. 455.

One who kills another in a quarrel which he himself provoked cannot justify his act on the ground of self-defense: *People* v. *O'Brien*, 78 Cal. 41; *State* v. *Hardy*, 95 Mo. 455; *State* v. *Stiltz*, 97 Id. 20; nor can a killing be justified by a plea of self-defense, if defendant was beyond danger from the deceased when he killed him: *Squire* v. *State*, 87 Ala. 114; but a defendant cannot be deprived of his right to plead self-defense simply because words, which were innocently spoken by him, or acts done by him with no bad intent, had the effect of provoking a difficulty: *Allen* v. *Commonwealth*, 86 Ky. 642.

When the defendant is entitled, under the evidence, to the benefit of the plea of self-defense at all, the court must fully charge the jury as to the law of self-defense and its application: *Cook* v. *Commonwealth*, 86 Ky. 663; *Kelley* v. *State*, 27 Tex. App. 562; *Tillery* v. *State*, 24 Id. 251; 5 Am. St. Rep. 882.

PEOPLE *v.* McLEAN.

[71 MICHIGAN, 309.]

CRIMINAL LAW — RAPE — EVIDENCE OF PARTICULAR UNCHASTE ACTS. — In prosecutions for rape, the general character of the prosecutrix for chastity may be impeached, but specific acts of sexual intercourse by her with third persons cannot be shown, and when she denies the commission of such acts on cross-examination, her answer is conclusive.

Moses Taggart, attorney-general, and W. A. Burritt, prosecuting attorney, for the people.

Gallup and Pearson, for the respondent.

LONG, J. The respondent was convicted of an assault with intent to commit the crime of rape, in the circuit court for the county of Clare, on January 24, 1888, and brings the case into this court by writ of error.

On the trial of the cause, Myrtie Merrill was called as a witness by the people, and testified that she was the daughter of Wellington Merrill and Fannie McLean; that her father is the complainant in this case, and is now living; and that he was divorced from her mother about one year ago, soon after which time the respondent, Laughlin McLean, and her mother were married; that about August 1, 1887, her mother was called away from home to attend the funeral of her parent, and after her mother had been away from home a few days, the defendant came into her room one night, soon after she had retired, and then and there ravished and carnally knew her, and that said act was by force and against her will; that it was about one week before her mother came home, and that she continued to keep house for the defendant until her mother returned, about one week after which time witness told her of the affair; that this was the first she told any one about it; and that she told one of her school-mates about it some time afterwards, and told no one else until she told her father.

On her cross-examination by defendant's counsel, she testified that one Alfonzo Langworthy worked for Mr. McLean during the summer of 1887, and that he went away from his house only a few days before the time when her mother went to the southern part of the state to attend the funeral of her parent; that she had never before had sexual intercourse with any one; that she had not told Mr. and Mrs. Bates that she had sexual intercourse with Alfonzo Langworthy, at the time she was stopping at their house; that she stopped there at the time of the arrest in this case.

The people here rested their case, and the defendant called as witnesses in his behalf Mr. and Mrs. Bates, and offered to prove by them that Myrtie Merrill did tell them, while stopping at their house, that she had had sexual intercourse with Alfonzo Langworthy several times while he was working for the defendant. This evidence was excluded by the court, and error is assigned upon such ruling. This raises the only question in the case for review.

The rule is laid down by Mr. Greenleaf, in his work on evidence (3 Greenl. Ev., sec. 214), that the character of the prosecutrix for chastity may be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to criminal connection with any other person, except as to her previous intercourse with

the prisoner himself; nor is such evidence of other instances admissible. The weight of authority both in this country and England is decidedly against the admissibility of such evidence.

In *King* v. *Hodgson*, Russ. & R. C. C. 211, the prisoner's counsel offered a witness to prove that he had sexual intercourse with complainant about a year before the charge; but Wood, B., who presided at the trial, rejected the evidence. Subsequently the question as to the admissibility of such evidence was argued before the twelve judges of England; and it was decided by them unanimously, on the 30th of January, 1812, that the objection to its reception had been properly allowed.

In *King* v. *Clarke*, 2 Stark. 241, it was held that, in the case of an indictment for rape, evidence that the woman had a bad character previous to the supposed commission of the offense is admissible; but the defendant cannot go into the evidence of particular facts.

In Phillipps on Evidence, 3d ed., 222, 223, it is laid down as a rule that, on an indictment for rape, the woman is not obliged to answer whether, on some former occasion, she had not a criminal connection with other men, or with particular individuals; nor is evidence of such criminal intercourse admissible.

Defendant's counsel cite *People* v. *Abbot*, 19 Wend. 192, in support of the doctrine for which they contend. Mr. Justice Strong, speaking of the above case in *People* v. *Jackson*, 3 Park. Cr. 391, says it is true that Judge Cowen, in the case of *People* v. *Abbot*, *supra*, disapproves of the rule, strongly sustained as it is by numerous judicial decisions and the opinions of many elementary writers; but the point was not necessarily raised in that case, as the conviction was reversed on the ground that the court of general sessions, before which the trial for rape had been conducted, had no jurisdiction of the case; and what was said by the learned judge as to the rejection of evidence was a mere *obiter dictum*.

In *Strang* v. *People*, 24 Mich. 1, Mr Justice Cooley, speaking for the court, says: "The prosecutrix could not be supposed to have come prepared to meet charges of this character; and though the defense might question her regarding them, the right to go into proof of particular facts is not very clear."

Evidence that the prosecutrix is a common prostitute, or

that her character for chastity is bad, is admissible, and particular acts of unchastity or sexual intercourse with the defendant may be shown; but evidence of such acts with a third person is not admissible: *McDermott* v. *State*, 13 Ohio St. 332; 82 Am. Rep. 444.

It being incompetent to show specific acts of intercourse by the prosecutrix with third persons, the fact could not be shown that the girl, Myrtie Merrill, stated that she had such intercourse with Alfonzo Langworthy. She had denied making such statements upon her cross-examination by defendant's counsel, and her answer is conclusive. The defense had no right to attack her in this way, and the court properly excluded the evidence.

The judgment must be affirmed.

RAPE. — The prosecutrix in a rape case may be impeached by proof of her bad character in a general way, but not by evidence of particular acts of unchastity on her part with other persons than the defendant: Note to *Smith* v. *State*, 80 Am. Dec. 368, 369; *McQuirk* v. *State*, 84 Ala. 435; 5 Am. St. Rep. 381, and note.

At a trial for rape, proof that the daughter of the prosecutrix living with her had an illegitimate child was such an attack upon prosecutrix's character as would admit evidence as to her general character: *Coleman* v. *Commonwealth*, 84 Va. 1.

Where several are being prosecuted for rape, the prosecutrix must answer, upon cross-examination, as to whether she had not, a short time before the alleged rape, voluntarily participated in sexual intercourse with one accused by her in conjunction with defendants, and indicted with them, but as to whom the prosecution had been dismissed: *Bedgood* v. *State*, 115 Ind. 275.

FIRESTONE *v.* RICE.

[71 MICHIGAN, 377.]

ARREST — LIABILITY OF PRIVATE PERSON FOR MAKING. — When a private person is ordered by a sheriff to make an arrest, and acts in obedience to such order in arresting and handcuffing the prisoner, he is justified in so doing, though the act of the officer was without authority.

ARREST — LIABILITY OF PRIVATE PERSON FOR MAKING. — A private person called upon by a sheriff to make an arrest is not required at his peril to ascertain whether such officer has a proper warrant, or whether the offense charged is a felony, and he cannot refuse to act until he shall be satisfied that the officer is acting legally, or within the scope of his office.

ARREST — LIABILITY OF PRIVATE PERSON FOR MAKING. — A private person who responds to the call of one whom he knows to be an officer, to assist him in making an arrest, is protected by the call from liability for rendering the requisite assistance; and though the officer is acting illegally,

the person assisting him at his command, relying upon his official character and call, is protected against suits for trespass and false imprisonment, if, in his acts, he confines himself to the order of the officer.

ARREST — RIGHT TO ARREST WITHOUT PROCESS. — When the statute punishes an offense by imprisonment in the state prison, unless it is expressly declared to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process.

ARREST — DISCRETION OF OFFICER AS TO MEANS EMPLOYED IN MAKING. — Some discretion is reposed in an officer in making an arrest for felony as to the means taken to apprehend the offender and keep him safe and secure thereafter. This discretion cannot be questioned, unless abused through malice, or reckless indifference to the common dictates of humanity, and without any view to prevent the escape of the supposed offender.

ARREST — RIGHT OF OFFICER TO HANDCUFF PRISONER. — An officer having reasonable cause for arresting a person for felony is justified in handcuffing the prisoner to prevent his escape, though he is not unruly, makes no attempt to escape, and does nothing indicating necessity for such restraint; nor need he be a notorious bad character in order to justify the handcuffing. Other reasons may exist why extreme measures should be resorted to to secure and safely lodge the prisoner.

ARREST — DUTY OF OFFICER TO MAKE. — It is the duty of an officer to take a supposed felon, safely keep him, and bring him before a magistrate, and he cannot stop when the accused is unknown to him, at the moment of arrest, to inquire into his character, his intent to escape, or his guilt or innocence.

ARREST — RIGHT OF OFFICER TO HANDCUFF PRISONER. — An officer, having reasonable cause to believe a person to be guilty of felony, may, in arresting, handcuff him; and if this is done without wantonness or malice, the officer cannot be held liable in damages for what, at the time, seemed to him reasonable and right, though it transpires that his precautions were unnecessary in the light of after-acquired knowledge of the true character and intent of the accused.

Padgham and Padgham, for the appellant.

C. R. Wilkes, for the defendants.

MORSE, J. This suit was brought to recover damages for false imprisonment, and assault and battery upon the plaintiff, alleged to have taken place on the night of August 6, 1885. Rice, at the time, was sheriff of Allegan County, and Fenn was night-watch of the village of Allegan. The arrest occurred in the township of Monterey, in that county. Upon the trial, it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one

Zeigler, who was arrested at the same time and place as the plaintiff.

The court instructed the jury that if Fenn knew that Rice was sheriff, and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and their verdict, as to Fenn, should be no cause of action. "Under the laws of this state, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable, and for that reason I give you this request."

The jury rendered a verdict in favor of both defendants.

The plaintiff alleges error in the charge of the court as above given. There was no error in this direction. It is admitted that Fenn did nothing in wantonness or in malice. He went to the house of Zeigler, where the arrest was made, at the request of the sheriff, and while there, under his direction, placed handcuffs upon plaintiff, and rode beside him in a buggy to Allegan. The court would have been warranted in directing a verdict in Fenn's favor.

The sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace: Howell's Stats., sec. 591; and if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment: Id., sec. 9250.

We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the effense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required.

Therefore, the person who responds to the call of one whom

he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff: *McMahan* v. *Green*, 34 Vt. 69; 80 Am. Dec. 665; *Reed* v. *Rice*, 2 J. J. Marsh. 44; 19 Am. Dec. 122.

The plaintiff and Zeigler were arrested for the commission of a statutory offense under section 9168, Howell's Statutes, which reads as follows: "Every person who shall willfully and maliciously break down, injure, remove, or destroy any dam, reservoir, canal, or trench, or any gate, flume, flashboards, or other appurtenances thereof, or any levee or structure for the purpose of conveying water to any such dam or reservoir, or any of the wheels, mill-gear, or machinery of any mill, or shall willfully or wantonly, without color of right, draw off the water contained in any mill-pond, reservoir, canal, or trench, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year."

The sheriff had a warrant against Zeigler, but none against the plaintiff.

It is claimed by the counsel for the plaintiff that this statutory crime is not a felony, but a misdemeanor, and the circuit judge was requested to so instruct the jury, and to further direct them that, therefore, the arrest of plaintiff was unwarranted and illegal, as no lawful arrest could be made without process. The court refused to comply with this request, and charged the jury that the offense was a felony under the laws of this state. Under the statute and the previous decisions of this court, we think that whenever a statute punishes an offense by imprisonment in the state prison, unless it is expressly declared by the statute to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process: See Howell's Statutes, sec. 9430; *People* v. *Brigham*, 2 Mich. 550; *Shannon* v. *People*, 5 Id. 71; *People* v. *Bristol*, 23 Id. 118; *People* v. *Sweeney*, 55 Id. 589; *Drennan* v. *People*, 10 Id. 169; *People* v. *Donald*, 48 Id. 493.

The counsel for the plaintiff also claim that the sheriff,

under the circumstances, had no right to handcuff the prisoners; that the same was an unnecessary indignity and an outrage; and that the plaintiff, by reason of riding handcuffed in a buggy for several miles over a rough and jolting road in the night-time, received injuries to his health and person, from which he suffered for a long space of time. And they complain of the charge of the court in this respect.

The court was requested to direct the jury as follows: "If you find, from the evidence in this case, that the defendants put handcuffs on the plaintiff, and compelled him to go a long distance with them on, and that plaintiff in no way attempted to escape when arrested, and offered no resistance at any time, then I charge you that defendants would be guilty of assault and battery on the plaintiff, and would be liable to him for such an amount in damages as, under all the circumstances of this case, the plaintiff ought to recover. When a person is arrested for the commission of a supposed crime, and is taken and held for trial or examination, as the case may be, the prisoner ought to be used with the utmost humanity, and at the time of arrest, and during his being taken to prison, should not be fettered or handcuffed, nor subjected to any other hardships than such as are absolutely necessary for the purpose of safe-keeping and confinement under the arrest; and an officer is not justified in handcuffing a prisoner unless he is unruly, or attempts to escape, or is a notoriously bad character, or does something indicating a necessity on the part of the officer to restrain him by handcuffing; that the evidence in this case does not disclose any necessity for the handcuffing of the plaintiff, as it was done."

These requests were refused, and the court, in relation to this claim of the plaintiff, instructed the jury in the language following: "Now, while an officer is bound to treat his prisoner with such kindness and humanity as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in arrest for felony or offenses of magnitude. His action, in this regard, is to be considered in the light of all the circumstances of the particular case bearing upon the question of what means are reasonably necessary to keep his prisoner secure. I do not think, gentlemen of the jury, in this case, under the undisputed circumstances surrounding this arrest, as shown by the evidence, you would be warranted in holding

the defendant Rice liable for any damages in this action, solely upon the grounds that the handcuffs were placed upon the plaintiff by his direction, and kept there until the jail was reached, unless you find that this was ordered without any view to prevent the escape of the plaintiff, or keep him in safe custody. If it was a wanton act, and done without any view to secure the plaintiff or prevent his escape, the defendant Rice would be liable for the damages resulting from the placing and continuing of the handcuffs upon the plaintiff."

The question of probable cause for this arrest was properly submitted to the jury; and, from the undisputed facts of the case, we are of the opinion that the sheriff was justified in arresting the plaintiff. It was represented to the sheriff by one William Dumont and his brother John, who came to Allegan and waked Rice up in the night, that the dam of the said John Dumont had been cut that night, and that the Dumont brothers had tracked two persons directly from the spot where the dam was opened to the house of John Zeigler. The Dumonts were old citizens of Allegan County, and there was no reason why the sheriff should doubt the truth of the representations made by them; and a warrant was procured by John Dumont against Zeigler, and also directed against another as an unknown person.

Upon reaching the house, they found Zeigler and Firestone in bed. The wet boots of Zeigler and the shoes of plaintiff were found at the house, and measured by Dumont, who claimed that they corresponded exactly with the tracks. The pantaloons of both parties were wet around the bottom of the legs, and a spade was found inside the kitchen door which appeared to have been recently used. The lower part of this spade was wet and clean, but upon the upper part of the blade sand was sticking, which Dumont informed Rice was, in appearance, like the sand of which his dam was constructed.

Firestone was the only male occupant of the house besides Zeigler, and there can be no reasonable claim made, under these circumstances, that the officer did not have probable cause for taking him into custody. Having reasonable cause for making the arrest, the question arises, Was the officer justified in handcuffing the parties?

We think the rule laid down by the circuit judge a proper one. There must be some discretion reposed in a sheriff or other officer making an arrest for felony as to the means taken to apprehend the supposed offender, and to keep him

safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury, unless it has been abused through malice or wantonness, or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person.

It is not necessary, as claimed by the plaintiff's counsel, that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing, at the time of the arrest, in the way of attempting to escape, or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons, as it seems to me there were in this case, why such extreme measures should be resorted to in order to secure and safely lodge the prisoner.

In this case there was evidence tending to show that the sheriff was informed that these men, Zeigler and Firestone, were "slippery" and desperate men. He did not know either of them personally, and had no information, save what he received from the Dumonts that evening, as to their reputation and character in the community; and he had no time to make inquiry.

The arrest was made in the night, at a late hour, under the supposition, if not made then, that the persons sought, or at least the plaintiff, might escape apprehension altogether, or only be captured after much hunting and expense. The night was dark, and the country wooded. The parties had to be taken about eighty rods, along an old winding wood-road, to the buggy, every foot of the way opening and inviting an opportunity to escape. From there to Allegan was a night drive, with two officers and two prisoners. There was no evidence of any harshness upon the part of the sheriff or Fenn, other than the placing of the handcuffs upon Zeigler and plaintiff. The plaintiff made no complaint at the time.

There is nowhere in the whole record a single instance tending to show malice or wantonness on the part of the sheriff. There is absolutely no evidence tending to show any ill-will, or even a malevolent impulse, of the sheriff towards plaintiff or Zeigler.

It appears, from the testimony of the sheriff, that upon the same day of this arrest a prisoner had broken away from him

in the daytime in the streets of Allegan, causing him some effort and trouble to recapture him.

It is plainly apparent that in this case the sheriff put the handcuffs upon plaintiff for no other purpose than to prevent his escape, and that he had good reason to believe it was necessary to do so. That it turned out afterwards that the plaintiff was innocent of any offense, was neither a "slippery" nor desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape, cannot alter the rule which saves the sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable.

The arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities ofttimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime.

An officer is bound to act humanely, and cannot lightly and without reason either arrest or harshly treat a supposed offender, be he innocent or guilty. It is, no doubt, true that petty officers, too often unduly inflated by a too high conception of their office and authority, are inhuman and cruel in their treatment of suspected persons. Such conduct the law does not hesitate to punish. But to mulct the sheriff, under the circumstances of this case, in damages for handcuffing the plaintiff while conveying him, on a dark night, through the woods, to the village of Allegan, when he had good reason to suspect him to be guilty of a felony, and one likely to escape at the first opportunity, when it was done neither in recklessness, wantonness, nor malice, would be to put in peril every officer of the law who, under like circumstances, was alert and vigilant in the performance of his duties in the arrest of supposed criminals.

The hardened and skillful offender against the criminal laws is sometimes and generally the meekest when arrested, but his eye is open to every avenue of escape; and to say that, unless such person attempts to escape, resists arrest, or is known to the officer to be a notoriously bad character, he cannot be shackled for an hour or two until he can be conveyed to a place of safety, is to lay down a rule which will make escapes easy, and place new obstacles in the way of the apprehension and safe-keeping of offenders. The sheriff cannot stop,

when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable and right.

Several assignments of error are made to the ruling of the trial judge upon matters of evidence, but we find no merit in any of them.

The statements made to the sheriff by the Dumont brothers, both before and at the time of the arrest, were material and competent, bearing upon the question of probable cause for making the arrest, and also upon the reasonableness of the act of the sheriff as to the use of the handcuffs. It was also proper for the sheriff to testify that he believed such statements as bearing materially upon his good faith as to both of these matters.

We find no error in the record, and the judgment must be affirmed, with costs.

ARREST — RIGHT TO ARREST WITHOUT PROCESS: Note to *Roberts* v. *State*, 55 Am. Dec. 104; *Veneman* v. *Jones*, 118 Ind. 41; 10 Am. St. Rep. 100, and note. No arrest can be made for a misdemeanor already committed, except upon a proper warrant: *People* v. *McLean*, 68 Mich. 480; *Ross* v. *Leggett*, 61 Id. 445; 1 Am. St. Rep. 608, and note.

ARREST. — AS TO THE DUTY AND LIABILITY OF PRIVATE PERSONS who, at the command of an officer, assist in making arrests: Note to *Hawkins* v. *Commonwealth*, 61 Am. Dec. 154, 155.

FELONY — MISDEMEANOR. — The distinction between felonies and misdemeanors depends upon statutory graduation, not upon the common-law classification: *State* v. *Smith*, 32 Me. 369; 54 Am. Dec. 578; *Smith* v. *State*, 33 Me. 48; 54 Am. Dec. 607.

CLEAVER *v.* TRADERS' INSURANCE COMPANY.

[71 MICHIGAN, 414.]

INSURANCE. — INSURED MUST BE HELD TO KNOWLEDGE OF THE CONDITIONS of his contract of insurance. The fact that he has never seen his policy, nor read it, cannot help him, when no adequate reason is shown why he could not have seen it, had he desired to do so.

INSURANCE. — FORFEITURE OF POLICY OF INSURANCE incurred by taking additional insurance contrary to the conditions of the policy is not saved by proof that the agent had authority in a certain manner to consent to the taking of additional insurance, and had done so in other cases, when it is not shown that he so consented in plaintiff's case, within the line of his authority or in the manner prescribed in the policy, or that he was authorized to waive any of its conditions.

INSURANCE — WAIVER OF FORFEITURE. — A forfeiture of a policy by taking additional insurance in violation of its conditions may be waived by the company, when, with knowledge of the forfeiture and supposing it to be waived, it fails to notify the insured of its intention to insist on the forfeiture until after its adjuster has visited the insured and obtained from him all the information asked for in relation to the extent and value of his loss. Such action by the company will warrant the jury in finding a waiver of the forfeiture, and that question should be submitted to it.

T. W. Atwood, for the appellant.

Norris and Norris, for the defendant.

MORSE, J. This case has been once before in this court, and will be found reported in 65 Mich. 527; 8 Am. St. Rep. 908. Upon a trial since then, in the circuit, the defendant had judgment, the court instructing the jury to find a verdict in its favor. It is claimed by the counsel for the defendant that the case as presented upon this last trial does not differ materially from the case made at the first trial, and that the ruling of the circuit judge was in accord with the decision of this court, as above reported. But the counsel for the plaintiff contends that the evidence taken on the last trial, and contained in the record now before us, differs from that taken before in this: 1. There is testimony now, not presented before, that the plaintiff never had his policy in his possession, and therefore knew nothing of the clause which governed the ruling of this court in its former opinion; 2. That it is now shown that the agent, Quinn, did have authority to consent to the taking of other insurance; 3. That there is testimony in the present record tending to show that, after the fire, with full knowledge of all the facts, the defendant, by its acts, waived the forfeiture of the policy, if any such forfeiture had taken place.

It appears, from the record, that the plaintiff testified on the

last trial that Quinn asked him where his policy was, and the plaintiff replied that he had never had it. Quinn says: "I know now you never had it." Quinn then said that the consent for the additional insurance ought to be indorsed upon the policy, but that he could enter it upon his books,—make a memorandum of it,—and it would be just as well. He went and got his book, but plaintiff did not see him write anything in it. Quinn denies that any such thing took place. The plaintiff's excuse for not testifying to this fact upon the first trial is, that he was not asked about it. Quinn also testified on the last trial that, as agent of the company, he had power to consent to other insurance, and had done so repeatedly. This fact does not appear in the record before us of the first trial. The extent of his authority to consent, however, was by indorsing the same upon the policy, and reporting such indorsement immediately to the company. The plaintiff testifies also that he never saw the policy in suit before the fire, but that this policy was a renewal of one which he had upon the same property before, which policy he thinks he read, and probably got the idea from reading it that he must get the consent of the company before taking additional insurance.

We do not think that these additional facts, as testified to by the plaintiff and Mr. Quinn, materially change the *status* of the case. As we said when the case was here before, it was the duty of the plaintiff to know what his contract of insurance was, and the insured must be held to a knowledge of the conditions of his policy as he would be in the case of any other contract or agreement. The fact that plaintiff had never seen his policy does not help him any more than the fact that he had not read it, which appeared upon the first trial. There is no adequate reason shown why he could not have seen the policy had he desired to do so, and the same was not kept from him through any fault or fraud of the defendant or its agent. It was delivered to Mr. Whitney, with his knowledge and consent, who assigned it back to him before the commencement of this suit.

The fact that Quinn had authority, in a certain way and manner, to consent to the taking of additional insurance, and had done so in other cases, does not aid plaintiff. He did not consent in this case, within the line of his authority, or in the manner prescribed by the policy; and it is not shown that he was authorized to waive any of its provisions. The case, therefore, in this respect, stands as it did before, controlled by

the clauses in the policy providing that the policy should be void if the insured procured further insurance without the indorsement of the consent of the company upon the policy, and that the agent has no authority to waive or modify this condition.

But we think that the question of waiver should have been submitted to the jury. It appears that on the day of the fire Quinn informed the company by telegraph of the loss. The secretary of the company at Chicago upon the same day wrote to Quinn in reference to the fire. Quinn replied by letter of date December 30, 1884, three days after the fire, in which he stated to the company that there was this additional insurance upon the property in the Millers' Mutual Insurance Company of Lansing, and as there was no indorsement of permission in his record of contents of policy, he would make an explanation of his knowledge of such additional insurance. He then proceeds to state in his letter, substantially as he testified on both trials, that Cleaver, who was a client of his, came into his office, and said that the agent of the Millers' Mutual Insurance Company had examined his mill, and had urged him to take insurance; that he had made up his mind to take two thousand dollars in that company. Quinn looked over the application, and "filled up" some of the answers. He understood that the Millers' Mutual Insurance Company had agreed to accept this application, and carry the insurance, and knew that Cleaver had received his policy afterwards. He further stated in this letter that nothing was said by Cleaver about getting consent for other insurance, and his attention not being called to it, he (Quinn) did not think about there being no permission for the other insurance. "If he had asked for it, I would of course have consented, as the property would stand more insurance, and Cleaver is a first-class man."

The letter concludes as follows:—

"The property is totally destroyed, and the loss is complete. The origin of the fire is unknown. Cleaver lives on farm in country, and was not here. His partner, Wilder, lives in the village, and when awakened by watchman, the mill, which is some distance from the village, was all on fire. The alarm was given at three o'clock in the morning, at which time it was a mass of flames. It had unquestionably been on fire some time previous, as I was told by a farmer who lives near town he observed the light at half-past one. Wilder, partner

in running mill, was in there until ten o'clock at night, and says, when he left, everything was secure. The firm was doing a good business, and had heavy stock on hand, and the fire, no doubt, is a great loss both to Cleaver and the firm.

"Our village is getting badly scorched by fires. We had another heavy fire—Wilcox and Weal's planing-mill—last night. Fortunately, the policy I had on the mill expired last spring, and they would not renew with me.

"Yours truly, T. C. QUINN.

"P. S.—Cleaver never has had possession of your policies for either year, nor in fact has he ever seen them. I delivered them to agt. of Whitney, the mortgagee, who forwarded the policy to him. T. C. Q."

The secretary replied as follows:—

"Loss. CHICAGO, January 5, 1885.

"T. C. QUINN, ESQ., Agt., Caro, Mich.

"*Dear Sir*,—Yours of the 30th ult., giving us further information in regard to loss under policy 55,313, James W. Cleaver, is received. We presume that the conversation that you had with Mr. C. in regard to the other insurance will be a waiver of any rights we might have under our policy on this subject of additional insurance without notice. Our adjuster will be able to give this loss attention some time next week, and will make a thorough investigation of the origin of the fire, value of the property, etc. If it is totally burned up, as you say, there is no special hurry. Yours truly,

"R. J. SMITH, Sec'y."

It will be seen by this last letter that the company, after reading Quinn's statement of the facts of his connection with the taking of the additional insurance, supposed that it had waived any forfeiture of the insurance contract because of the non-indorsement of consent to the same upon the policy.

In February, 1885, its adjuster, one Berne, appeared at Caro. Before that time, Mr. Cleaver, or his attorney, was notified to measure the shafting, gearing, etc., about the mill, so that an accurate account could be taken. Berne sent for Cleaver, who lived five miles out in the country, and was with him nearly two days. Cleaver testifies that he said he was an adjuster of the company, and had come to adjust his loss. He wanted Cleaver to furnish length of belts, shafting, and size of pulleys. Plaintiff told him he could not do it, but would find Mr. Adams, who could. He got Mr. Adams, who made a state-

ment of length of shafting, size of pulleys, length of belts, length of the elevator, size of the bolts, size of the bolts to the stones, and the size and number of the stones, and went through the mill generally. Berne made objections finally to paying the whole loss, because the application stated that the mill had not settled, and he had ascertained that it had settled, and offered plaintiff two thousand dollars in settlement of the loss, which plaintiff refused. Cleaver swears that Berne did not say anything about the taking of the additional insurance, or assign any other reason than that of the mill settling, why he would not pay the full amount of the insurance.

Berne admits that he required the statement, and that plaintiff procured Adams, who went with him to the ruins, and there estimated the value of the property. He says: "Plaintiff furnished me with everything I asked him for." Admits offering him the two thousand dollars, but swears that he brought the matter of additional insurance to Cleaver's attention, and told him that the company was under no legal obligation to pay him any of the insurance on that account; that his policy was violated, but that he offered him this amount because he thought the fire was a fair one, and that two thousand dollars was the fair value of his loss, added to what he would receive from the other company.

It will be seen that the defendant company was notified about the 1st of January of this fact, now relied upon to void this policy, but supposed that it had probably waived it. It did not notify the plaintiff that it intended to take advantage of this additional insurance, at least until after its adjuster had been sent to Caro, and had asked of Mr. Cleaver and received from him all the information asked for in relation to the extent and value of his loss, taking two days of his time, and the services of another man besides. This information, time, and labor asked by the company, and furnished by the plaintiff, was wholly unnecessary under the defense made in this suit.

The undisputed action of the company, and the course pursued by its adjuster, if the testimony of the plaintiff was believed, that Berne made no point of the taking of the additional insurance as a reason why the insurance should not be paid, were sufficient, under the previous rulings of this court, to warrant the jury in finding a waiver by the company of the defense made upon the trial, and to authorize a judgment in favor of the plaintiff for the amount of his insurance. And

I am inclined to the opinion that such a waiver in law was made out, even if the testimony of the adjuster be taken as true, instead of that of the plaintiff: *Carpenter* v. *Continental Ins. Co.*, 61 Mich. 635, 645; *Marthinson* v. *North British etc. Ins. Co.*, 64 Id. 372; *Cobbs* v. *Fire Ass'n of Phila.*, 68 Id. 463, 465.

The judgment must be reversed, and a new trial granted, with costs of this court to plaintiff.

INSURANCE — As to conditions in insurance policies against additional subsequent insurance upon the same property: *Queen Ins. Co.* v. *Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and particularly cases cited in note 58. The existence of a valid policy of insurance upon the property covered by a second policy, which declares that it shall be void in case there is then, or during its life there shall be, any additional insurance, whether valid or not, renders the second policy void: *Keyser* v. *Hartford Ins. Co.*, 66 Mich. 664; and to the same effect is *London etc. F. Ins. Co.* v. *Turnbull*, 86 Ky. 230.

INSURANCE. — WAIVER OF CONDITIONS as to forfeiture in insurance policies: Note to *Queen Ins. Co.* v. *Young*, 11 Am. St. Rep. 57, 58.

FARMERS' BANK OF GRASS LAKE *v.* QUICK.

[71 MICHIGAN, 534.]

MORTGAGES — FORECLOSURE — CONFIRMATION OF SALE. — An objection to the confirmation of a foreclosure sale that it was effected secretly, and without notice to defendant or his counsel, is without merit, when the record shows that defendant had full notice of the sale. It was his duty to inform his counsel.

MORTGAGES — FORECLOSURE — COLLATERAL ATTACK ON DECREE. — An appeal from an order confirming a sale cannot be used to review the decree of foreclosure, when the court below had jurisdiction of the subject-matter and of the parties.

MORTGAGES — FORECLOSURE — CONFIRMATION OF SALE. — An objection to the confirmation of a foreclosure sale alleging that the property was sold and bid in at a great sacrifice, and, in equity, ought to be resold, is without merit, in the absence of a showing that if a new sale were ordered, a larger or even as large a price could be obtained.

Lewis M. Powell, for the complainant.

Blair, Wilson, and Blair, for the appellant.

MORSE, J. The defendant John M. Quick appeals from the order entered in this cause in the circuit court for the county of Jackson, in chancery, confirming a sale made in pursuance of a foreclosure decree.

The bill was filed to foreclose a mortgage, dated January 13, 1879, executed by the deceased, John Quick, to one Alonzo

Bennett. A bond accompanied the mortgage. Alonzo Bennett assigned this bond and mortgage to the complainant, May 5, 1886. The bill was filed May 13, 1886.

At the time of the commencement of this suit, John Quick was dead, and the defendant Alexander Beller had been appointed administrator of his estate, with the will annexed. John M. Quick was in possession of the lands described in the mortgage as residuary legatee of the deceased, John Quick. John Quick left surviving him a widow, Caroline Quick. She was not made a party to the bill, nor were any of the heirs or legatees save the said John M. Quick. The defendant John M. Quick did not appear, and the bill was taken as confessed by him. The defendant Beller answered, and the cause was heard upon pleadings and proofs taken in open court. The decree was entered July 8, 1887; and it was declared by such decree that the mortgage was void against a certain portion of the premises, decreed to have been a homestead at the time the mortgage was executed, which mortgage the wife did not sign. The sum due upon the mortgage was found to be, at the date of the decree, $3,901.06, and it was declared that the said John M. Quick was personally liable for the payment thereof, and a sale was ordered of the remaining lands as described in the mortgage, if such sum was not paid on or before August 1, 1887.

November 7, 1887, the property was advertised for sale under this decree by J. W. Blakely, a circuit court commissioner. December 15, 1887, the defendant John M. Quick filed his petition for leave to file a bill of review, and thereafter the sale was adjourned until January 5, 1888. It was further adjourned until January 19, 1888, when the property was sold, and bid in by the complainant at the sum of $4,075. The usual order *nisi* was entered to confirm the sale. The defendant John M. Quick filed exceptions to such confirmation, which were heard and overruled, and the sale confirmed March 5, 1888.

It appears that, upon the petition for leave to file a bill of review, the then circuit judge, Hon. G. T. Gridley, was not ready, on the last day of his official term, December 31, 1887, to pass his opinion; and it was agreed by the solicitors of the parties that he might take time to decide upon the petition, and file his opinion at any time thereafter as of that date, and that, in the mean time, the sale of the mortgaged premises should be adjourned from time to time, until such decision

was made. The circuit judge afterwards filed an opinion denying the prayer of the petitioner; but it is claimed that such opinion bears no date; and that no notice of the same, or of the sale of the premises, was given to the defendant John M. Quick, or his solicitors; and that they had no information of the same until after such sale. This is denied, however, and showing is made by the affidavit of the commissioner that he notified said Quick of such sale on January 16, 1888, three days before it took place. The affidavit of the solicitor for the complainant also shows that on January 12, 1888, he informed Quick that the sale had been adjourned one week, and that there would probably be no further adjournment of the same. The claim of the defendant is supported by the affidavit of himself and one of his counsel. One of the objections to the confirmation of the sale is, that such sale was effected secretly, and without notice to the defendant Quick, or his solicitors. We think the defendant Quick had full notice of the sale. It was his duty to inform his solicitors.

Ten exceptions were filed. Two of them are disposed of by the ruling above. Three are aimed at the bill of complaint and the decree. These cannot be considered here. The decree cannot be reviewed in this proceeding, nor the bill attacked. The court below had jurisdiction of the subject-matter and of the person of the defendant Quick. No appeal from the decree was taken; and this appeal, which is from the order of the court confirming the sale, cannot be used to review such decree: *Benedict* v. *Thompson*, 2 Doug. (Mich.) 299; *Burt* v. *Thomas*, 49 Mich. 463; *Bullard* v. *Green*, 10 Id. 268.

Another exception alleges that the premises were sold and bid in by the complainant at a great sacrifice, and in equity and justice ought to be resold. No showing is made, however, that if a new sale is ordered, a larger, or even as large, a price can be obtained at such new sale. We are not satisfied that the sale was unfair, and do not feel disposed to disturb the order of confirmation for this reason. The refusal of the circuit judge to grant leave to file the bill of review was, we think, within his discretion, fairly exercised. The other exceptions are without merit.

The order appealed from will be affirmed, with costs.

JUDGMENTS OR DECREES OF COURTS of competent jurisdiction cannot be collaterally assailed: Note to *Furgeson* v. *Jones*, 11 Am. St. Rep. 821; *School District* v. *Chicago Lumber Co.*, 41 Kan. 618; for only judgments and decrees

which are absolutely void can be collaterally attacked: *Essig* v. *Lower*, 120 Ind. 239; *Littleton* v. *Smith*, 119 Id. 230; *Sherman* v. *Bank*, 66 Miss. 648; note to *Furgeson* v. *Jones*, 11 Am. St. Rep. 821; compare *Maloney* v. *Dewey*, 127 Ill. 395; 11 Am. St. Rep. 131.

AS TO THE CONCLUSIVENESS AND VERITY OF RECORDS upon collateral attacks: *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; compare *Goodwin* v. *Sims*, 86 Ala. 102; 11 Am. St. Rep. 21.

KULENKAMP *v.* GROFF.

[71 MICHIGAN, 675.]

NEGOTIABLE INSTRUMENTS — SURETY — FRAUD IN OBTAINING SIGNATURE. — The non-performance of an oral agreement made at the time a note is signed by one as surety, that he shall not be liable thereon, and which agreement is at variance with the terms of the note, is not such fraud as will release such surety.

NEGOTIABLE INSTRUMENTS — SURETY. — PROOF OF AN ORAL AGREEMENT made at the time a note is signed by one as surety, that he should not be liable thereon, is not admissible under a claim of fraud to defeat the terms and purpose of the note.

NEGOTIABLE INSTRUMENTS — SURETY — EVIDENCE TO SHOW WANT OF CONSIDERATION FOR SIGNING NOTE. — Proof of the non-performance of an oral agreement made at the time a note is signed by one as surety, that he shall not be liable thereon, is admissible to show want of consideration for the promise made in the note, and that it was so signed simply to accommodate the payee therein.

CONSIDERATION. — CONTRACT OF SURETYSHIP NOT UNDER SEAL must be supported by a sufficient consideration.

Hewett and Freeman, and E. B. Norris, for the appellant.

John W. Patchin, and Sawyer and Knowlton, for the plaintiff.

MORSE, J. The plaintiff brought suit in justice's court upon the following promissory note:—

"$116.00. FREEDOM, March 30, 1886.

"One year after date, I promise to pay to Charles Kulenkamp, or bearer, the sum of one hundred and sixteen dollars, for value received, at the People's Bank, at Manchester, with use at seven per cent. "F. JOSEPH LERG.

"JOHN GROFF."

He obtained judgment. The defendant Groff thereupon appealed to the circuit court for the county of Washtenaw. Upon the trial in said circuit the defendant Groff gave evidence tending to establish the following facts:—

On the day the note was executed, Charles Kulenkamp, a brother of the plaintiff, held an auction upon his farm for the

sale of personal property. The plaintiff at this sale put up a span of horses of his own, and the defendant Groff assisted him in the sale by acting as a by-bidder to run the price up. One of these horses was bid in by defendant Lerg for the sum of $116. By the terms of the auction sale, the purchaser of property not paying therefor down in cash was required to give his note, with a signer or surety thereto. The note in question was drawn up by the auctioneer's clerk. Lerg signed it, and left it with the clerk. He requested Groff to sign it with him, but Groff refused. Afterwards the plaintiff accosted Groff, and requested him to sign it.

The defendant testifies as follows in regard to the conversation between himself and plaintiff: "Kulenkamp said I ought to sign the note. He was satisfied with Mr. Lerg for his pay, but he was rather slow, and thought if I would sign it he would get his pay out of it quicker than he would if I was not on, because he would not see me suffer, and I would not be holden on the note. He would see that I would not lose anything or have any trouble about it; and I told him it may be he would go to work, and dispose of the note, and then where would I be? He agreed to hold the note. He said it was a custom at auctions. If he did not get any signer, some others would want to give notes without signers. He agreed to hold the note, and see that I did not have any trouble. I refused, and after a while I said I would do it, but I wanted a witness. Mr. Burtless stood off a little way, and we got him up, and told it before him."

The defendant Lerg had no part in obtaining the signature of Groff to the note, and was not present when defendant signed it.

Upon this showing, which was not rebutted, the circuit judge ruled that no defense had been made to the note, and instructed the jury to find accordingly. The plaintiff had verdict and judgment for the face of the note, and interest.

The counsel for the defendant contend that this oral proof was admissible, and established a perfect defense to the note, if found to be true by the jury, to whom it should have been submitted. They claim that they have the right to show by parol, as between the original parties to the instrument, that it was never to be used or have any being as against Groff; and also that the testimony shows that the signature of Groff was procured by fraud upon the part of plaintiff, which fraud can be shown by parol.

It is admitted that the general rule is, that oral contemporaneous evidence is not admissible to vary, alter, or contradict the terms of a written instrument. But it is argued that to this rule there are several well-recognized exceptions, when the contest is between the immediate parties to a note. In such case, parol evidence is admissible to impeach the consideration, to show fraud or illegality in its inception, or that it was delivered conditionally, or for a spcified purpose only: See *Farwell* v. *Ensign*, 66 Mich. 600. The defendants' counsel insist that their claim, as before set forth, comes within the exceptions as to fraud and a delivery for a specified purpose.

As far as the claim of fraud is concerned, it is not tenable. The signature of Groff was not procured by false pretenses,—by the statement of any fact as existing which did not exist,—but upon false promises which have not been performed. It is no more nor less than the non-performance of an oral agreement made at the time the note was signed, and which oral agreement was totally at variance with the terms of the written contract as set forth in the note. This cannot be considered such a fraud as would nullify the note.

If proof of this unperformed agreement not to hold Groff upon this note, in plain contradiction to its terms, can be admitted to destroy his liability upon it, then any unperformed oral agreement made at the time a written contract or note is executed may be admitted, under the claim of fraud, to defeat the terms and purpose of the written agreement. The maker of a note, as well as the surety or indorser, may say: "It is true, I signed the note, but it was agreed I was not to pay it, and the collection of it is a fraud upon me."

Written instruments, under the admission and use of such proof to defeat them, would be of but little value, and altogether uncertain, and of no more strength than oral agreements: See *Ortmann* v. *Bank*, 39 Mich. 518, and cases cited.

It is insisted that the cases of *Manistee N. Bank* v. *Seymour*, 64 Mich. 59, and *Farwell* v. *Ensign*, 66 Id. 600, are authority in favor of the claim of the defendant. In the latter case, Justice Champlin, in speaking of the general rule, notices the following exceptions: "As between the immediate parties, parol evidence is admissible to impeach the consideration, to show fraud or illegality in its inception, or that it was delivered conditionally, or for a specified purpose only."

As before shown, there was no such fraud or illegality in the inception of this instrument as would vitiate it. Nor can it be

claimed to have been delivered conditionally, or for a "specified purpose only." It was delivered under the promise that, although Groff had solemnly agreed in writing to pay it, he should not be holden upon it. This is the substance of the whole matter. There was no condition attached to the delivery except this, that the oral agreement not to pay should supersede and control the written contract to pay. If this defense can be allowed, then, as before said, in speaking of the claim of fraud, every promissory note, as between the immediate parties thereto, and every contract in writing, is open to parol proof that it does not correctly represent the agreement made, and oral evidence may be given to contradict, alter, or vary such written agreement.

This is not the law in this state: *Seckler* v. *Fox*, 51 Mich. 92; *Kelsey* v. *Chamberlain*, 47 Id. 241; *Jones* v. *Phelps*, 5 Id. 218; *Sutherland* v. *Crane*, Walk. Ch. 523; *Martin* v. *Hamlin*, 18 Mich. 354; 100 Am. Dec. 181; *Adair* v. *Adair*, 5 Mich. 204; 71 Am. Dec. 779; *Vanderkarr* v. *Thompson*, 19 Mich. 82; *Beers* v. *Beers*, 22 Id. 42; *Gram* v. *Wasey*, 45 Id. 223.

For cases elsewhere similar to the one under consideration, see *Bank of Metropolis* v. *Dunn*, 6 Pet. 57; *Bank of U. S.* v. *Jones*, 8 Id. 14; *Davis* v. *Randall*, 115 Mass. 547; 15 Am. Rep. 146; *Hancock* v. *Fairfield*, 30 Me. 299; *Thompson* v. *McKee*, 5 Dak. 172; *Knoblauch* v. *Foglesong*, 38 Minn. 352; *Dickson* v. *Harris*, 60 Iowa, 727; *Billings* v. *Billings*, 10 Cush. 178; *Remington* v. *Wright*, 43 N. J. L. 451; *Ewing* v. *Clark*, 76 Mo. 545; *Pierpont* v. *Longden*, 46 Conn. 499; *Perry* v. *Bigelow*, 128 Mass. 129; *Stack* v. *Beach*, 74 Ind. 571.

But we think the evidence admissible to show no consideration for the promise made in the note. If the defendant's theory be correct, he did not execute this note at the request of Lerg, the principal maker, and the consideration running from plaintiff to Lerg had nothing to do with the signing of the note by the defendant. Neither was there any consideration passing from Lerg to the defendant. If, then, there was any valid consideration for the execution of this note by the defendant, it must have been one passing from the plaintiff to him. There is no showing that plaintiff would not have parted with his property, and taken the note of Lerg in payment for the same without the signature of the defendant, but on the contrary, the evidence given by the defendant shows that the plaintiff was willing to make the sale, relying upon Lerg alone for payment, and that he claimed that he desired

the name of the defendant only for the purpose of aiding him in securing a quicker payment from Lerg.

The note, then, if the defendant's testimony be taken as true, was signed by defendant to accommodate the plaintiff, with the promise that it should never be used against him. We can see no consideration moving to defendant from any one for the execution of this note by him. There is no dispute but his undertaking was really that of a surety.

Such a contract, not under seal, must be supported by a sufficient consideration. The usual consideration in such cases is that the credit to the principal debtor is induced or given because of the promise of the surety. This is not the case here. Nor is there shown any consideration arising out of either benefit to Lerg or the defendant, or detriment to the plaintiff, to support the contract of the defendant here.

Judgment will be reversed, and new trial granted, with costs.

SEAL UPON AN INSTRUMENT OF WRITING, as a general rule, imports a consideration: *Garden* v. *Derrickson*, 2 Del. Ch. 386; 95 Am. Dec. 286, and particularly extended note to the same.

PAROL TESTIMONY WITH RESPECT TO NEGOTIABLE INSTRUMENTS. — The general rule is, that extrinsic evidence is inadmissible to contradict or vary the legal effect of negotiable instruments; but to this general rule there are some well-defined exceptions: *Farwell* v. *Ensign*, 66 Mich. 600. Oral evidence of circumstances attending the execution of negotiable instruments is admissible, as between the parties, to aid in the interpretation of the words used therein, where such words in their application are not altogether intelligible: *Schmittler* v. *Simon*, 114 N. Y. 176; 11 Am. St. Rep. 621; such as parol testimony to show that it was the purpose of one to accept a draft by writing the word "excepted" upon it: *Cortelyou* v. *Maben*, 22 Neb. 697; 3 Am. St. Rep. 284. But parol testimony has been held to be inadmissible to show that a promissory note was intended merely for a receipt: *Mason* v. *Mason*, 72 Iowa, 457.

Oral agreements entered into contemporaneously with the execution of a promissory note cannot be proved to vary the effect of the note by attaching to it a condition which is inconsistent with the express terms of the note: *Harrison* v. *Morrison*, 39 Minn. 319; but where, contemporaneously with the execution of a promissory note, the parties enter into an oral agreement to the effect that, if the maker shall marry the payee, the latter will dismiss certain proceedings in bastardy, etc., pending against the former, and the note shall be deemed satisfied, such oral agreement and its performance may be proved to show payment of the note: *Tucker* v. *Tucker*, 113 Ind. 272; for parol testimony is admissible with respect to the real consideration of promissory notes: *Bogie* v. *Nolan*, 96 Mo. 85.

As between the original parties and subsequent indorsers with notice, parol testimony is admissible to show the true relation of the parties to the note and to each other, according to their own intention and agreement: *Lewis* v. *Long*, 102 N. C. 206; 11 Am. St. Rep. 725, and note; *Cagle* v. *Lane*, 49 Ark.

465; but this is not the case when the note clearly and unequivocally expresses the undertaking of the parties: *Heffner* v. *Brownell*, 75 Iowa, 341; *Junge* v. *Bowman*, 72 Id. 648; *Cook* v. *Brown*, 62 Mich. 473; 4 Am. St. Rep. 870.

As to parol evidence which may be admitted to vary the effect of an indorsement upon a negotiable instrument: *Kern* v. *Von Phul*, 7 Minn. 426; 82 Am. Dec. 105, and note. Ordinarily, parol evidence is inadmissible to vary or modify an indorsement in blank of a promissory note, but this rule does not prevent one, who is the payee of a note and who has indorsed it in blank, from showing that he indorsed it at the request of one who was a joint owner with him, in order that the note might be discounted for their joint benefit, with the agreement that half of the proceeds should be applied to the payment of the indorser's debt, but which agreement was never carried into effect: *Avery* v. *Miller*, 86 Ala. 495. So in an action by a payee against an indorser, the latter may show by parol testimony that when the note was executed and indorsed, the payee's agent agreed with the defendant that he should not be held liable upon his indorsement, but the payee would look only to the collateral security agreed to be given: *Cake* v. *Pottsville Bank*, 116 Pa. St. 264. So, too, the real character of the obligation intended to be assumed by one indorsing a negotiable instrument and signing his name, with the word "president" following it, may be shown by parol testimony: *Latham* v. *Houston Flour Mills*, 68 Tex. 127.

BEEBE *v.* MORRELL.

[76 MICHIGAN, 114.]

ATTACHMENT. — A sufficient affidavit is essential to support a writ of attachment.

AFFIDAVIT. — FORMAL REQUISITES OF AN AFFIDAVIT are, the title, venue, signature, *jurat*, and authentication.

AFFIDAVIT — WHEN PROPERLY ENTITLED. — As a general rule, an affidavit must be entitled in the suit in which it is to be used. Still, if no suit is pending at the time, it need not be entitled; but if a suit is pending, and the affidavit is entitled in a suit not pending, it is a nullity.

AFFIDAVIT — WHEN PROPERLY ENTITLED. — The test as to whether an affidavit is properly entitled is, whether or not perjury can be assigned upon it.

AFFIDAVIT — SUFFICIENCY OF. — It seems that an affidavit filed in a pending suit, but not entitled, is not a nullity; the only inquiry is, Has the affidavit been fully identified as having been filed in that case? If it has, then want of formality of title is of no consequence.

AFFIDAVITS — PRACTICE. — In civil suits, courts may refuse to hear affidavits read, not properly entitled in the case.

FILING OF PAPERS. — Papers are properly filed when delivered to the proper officer, and by him received to be kept on file.

AFFIDAVIT FOR ATTACHMENT IS PROPERLY FILED when left with the clerk, and by him received to be kept on file, and the fact that he did not indorse upon the affidavit the time it was received, and neglected to keep it on file, and attached it, or permitted it to be attached, to the writ, does not affect the validity of the latter. It is presumed that the affidavit was filed before the writ issued.

Willis B. Perkins and Charles B. Lothrop, for the appellant.

W. D. Totten and J. L. Boyd, for the plaintiff.

CHAMPLIN, J. The defendant is the sheriff of Kalkaska County. He was sued in trover by Beebe, and justified under a writ of attachment issued out of the circuit court for the county of Kalkaska, and to him directed, on the eighth day of September, 1888, in a certain suit wherein Charles T. Fletcher, Charles C. Jenks, George G. Boyne, and James A. Whiting were plaintiffs, and Waldron N. Noteware and George H. Beebe were defendants.

On the trial, the plaintiff gave evidence tending to show title in the property, and the damages, and the seizure and possession of the goods by defendant. The sheriff identified the writ of attachment as the one under which he seized and inventoried the goods in question. His counsel then offered the writ of attachment, and the files, records, and calendar entries in the same, in evidence. No judgment had been rendered in the cause in which the attachment was issued. It appeared, from the original files, as produced, that the affidavit in attachment consisted of one sheet at the time of the production, and was annexed to the writ of attachment. The return to the writ was also attached thereto, all constituting one package or file, which package was indorsed with the title of the cause, and the date of filing, October 2, 1888.

The affidavit was the first paper, and had no separate indorsement, title of the cause, or filing. To the admission of which writ of attachment in evidence, and the files and records, the plaintiff objected, on the following grounds: —

"1. That the affidavit was not entitled in the cause.

"2. It did not recite the commencement of suit by declaration in which said attachment was issued, nor show that at the time said affidavit was made the declaration had been served upon said defendants in said cause, or either of them.

"3. The records in said cause did not show that said affidavit was ever filed in said cause.

"4. At the time said attachment was issued, there was nothing on file in the office of the clerk of said court to show that the declaration in said cause had ever been served personally on either of the defendants in said cause.

"5. There is nothing in the attachment proceedings to show that the copy of the declaration was served upon either of the

defendants before the said writ of attachment issued, and the attachment does not recite such service."

Defendant then showed that no judgment had been entered in said cause in which said writ of attachment was issued, and then moved the court, the attorneys for the plaintiffs in said attachment suit being the same as the attorneys for the defendant in this cause, and then present in court, that said affidavit in attachment might be amended by properly entitling the same in said cause, and that the records in said attachment suit might be amended; and offered to show by oral testimony that said affidavit was actually filed therein on the day it was made, in the manner following:—

That said affidavit was duly taken to the clerk of the court on the day it was made, and that at that time the attachment then issued was attached to the back of said affidavit, and to the back of these papers was attached a cover, with the title of the cause indorsed thereon, and at the request of the plaintiffs' attorney the same was then marked by the clerk of said court "filed," the date of filing, and was signed by said clerk, and was taken away from said clerk's office together with the affidavit, and placed in the hands of the sheriff; and that upon the return of the sheriff being made and attached thereto, the said cover, upon which was the entitling and memorandum of filing, was lost; that diligent search had been made for the same, and that defendant had been unable to find it; also that the clerk of said court had no recollection of any circumstances connected with the filing of said affidavit, or whether said affidavit was in fact filed or not.

The proposed amendment and the proposed proof were duly objected to. The court sustained the objections, and further held that for the defects specified in the objections to the introduction of the writ, and files and records, the same were void and of no effect as against the rights of the plaintiff in said cause, and refused to admit said writ of attachment, files, records, and entries in evidence.

He also refused to permit the defendant to show that the title of the plaintiff to the goods was fraudulent and void as to the creditors of George H. Beebe and Waldron R. Noteware.

The files and records offered and excluded are returned, and appear in the bill of exceptions, from which it appears that suit was commenced by Charles T. Fletcher, Charles C. Jenks, George G. Boyne, and James Whiting against Waldron R.

Noteware and George H. Beebe, on the third day of September, 1888, by filing declaration and entering a rule to plead. The declaration, with notice of the rule to plead indorsed thereon, was served upon the defendants personally on the third day of September aforesaid, so that the suit was fully commenced upon that day, according to the provisions of the statute.

The sheriff did not file his return of service until the 17th of September, 1888. In the mean time, and on the eighth day of September, 1888, Charles C. Jenks, one of the members of the firm of Fletcher, Jenks, & Co., who were the plaintiffs in the suit commenced by declaration, made an affidavit, of which the following is a copy:—

"STATE OF MICHIGAN, }
COUNTY OF KALKASKA, } ss.

"Charles C. Jenks, being duly sworn, deposes and says that he is a member of the firm of Fletcher, Jenks, & Co., composed of Charles T. Fletcher, Charles C. Jenks, George G. Boyne, and James A. Whiting, doing business at Detroit, Michigan, and makes this affidavit in behalf of said firm, having authority so to do.

"Deponent further says that Noteware and Beebe, a firm composed of Waldron R. Noteware and George H. Beebe, residing and doing business at Kalkaska, Kalkaska County, in said state, are indebted to the said firm of Fletcher, Jenks, & Co., plaintiffs, in the sum of one thousand dollars, over and above all legal set-offs, as near as may be, and as near as this deponent can estimate the same, and that the same is now due and payable upon express contract.

"Deponent further says that he has good reason to believe, and does believe, that the said Noteware and Beebe have assigned and disposed of their property with intent to defraud their creditors. Further deponent saith not.

"CHARLES C. JENKS.

"Subscribed and sworn to before me this eighth day of September, A. D. 1888. FRED L. SWEET,
"Notary Public for Kalkaska County, Mich."

This affidavit is produced, annexed to the writ of attachment. There is no filing by the clerk upon the back thereof, but the writ of attachment to which it is annexed bears date the eighth day of September, 1888, and recites that the plaintiffs therein did, on the third day of September, 1888, com-

mence a suit in the circuit court for the county of Kalkaska, in said state, against Waldron R. Noteware and George H. Beebe, by filing declaration pursuant to the statute in such case made and provided. This writ was signed by the clerk of the court, and issued under its seal, and was returnable on the second day of October, 1888. Under this writ the sheriff seized the property in dispute on the eighth day of September, had it appraised, and on the twenty-ninth day of September personally served the defendants with a true and certified copy of the writ, together with a true and certified copy of the inventory and appraisal of the property seized.

It is the settled law of this state that there can be no valid writ of attachment without a sufficient affidavit.

There are two objections to the validity of the writ, which are the only ones of sufficient importance to demand notice: 1. The affidavit was not entitled in the cause in which it was required to be filed; 2. The affidavit was not in fact filed with the clerk before the writ issued.

The formal requisites of an affidavit are the title, venue, signature, *jurat*, and authentication. This affidavit contains all the formal parts, except the title or entitling in the cause. The general rule is, that the affidavit must be entitled in the suit in which it is to be used. If there be no suit pending at the time, of course, the affidavit must not be entitled. If a suit be pending, and the affidavit is entitled in a suit not pending, the affidavit is a nullity.

It is stated that the reason why the affidavit must be properly entitled is, that otherwise perjury cannot be assigned upon it. And it is said that this rule had its origin in England. But an examination of the English cases will show that the rule there laid down was, that affidavits for attachments for contempt and to hold to bail, and others of that class, made when no suit was pending, if entitled, would be nullities, because no suit was pending in which they were entitled, and hence perjury could not be assigned upon them; but none of them decide if an affidavit is made and used in a cause pending, and is not entitled, that perjury cannot be assigned upon it. This seems to be the test of sufficiency, so far as this formality is concerned.

It was held in 41 Eng. L. & Eq. 214, that perjury would lie, although the affidavit was not entitled in all the names of the defendants: 1 Russell on Crimes, 668. And in 2 Eng. L. & Eq. 236, it was held that the title need not have been written

upon the affidavit when made, if it be shown that it was made for the purposes of the suit in which it was filed, and for no other purpose. It was also held in *King* v. *Harrington*, 14 Mich. 540, that an affidavit not entitled is sufficient if it refers to another paper appended which is properly entitled. In such case, it must be assumed to have adopted the title by reference.

Our attention has not been called to any authorities, in our own state or elsewhere, where it has been held that an affidavit filed in a pending suit not entitled is a nullity. The inquiry in such cases is, Has the affidavit been fully identified as having been filed in that cause? If it has, then the want of the formality of a title is of no consequence, since the title is for the purpose of identifying the suit in which the affidavit is designed to be used: *Harris* v. *Lester*, 80 Ill. 307. In this case, the affidavit is fully identified as having been made to be used in the cause commenced by declaration, and as a basis for the attachment writ. It is attached to such writ, which specifies the suit by the names of the parties, and when and how commenced. In civil proceedings, courts may, and often do, refuse to hear affidavits that are not properly entitled in a cause read, because practice requires papers read in a cause to be correctly entitled.

The other objection will now be noticed. The statute provides: "At any time after said summons or declaration shall have been personally served on the defendant or defendants, or either of them, the plaintiff, or some person in his behalf, may make and file with the clerk of the court in which such action shall have been commenced an affidavit, which affidavit shall conform to and be governed by the provisions of section 2, chapter 114, Revised Statutes 1846, and being chapter 140, Compiled Laws."

Section 3 (Howell's Statutes, sec. 8020) enacts: "Upon filing such affidavit, said clerk shall issue a writ of attachment, which writ shall recite the commencement of said action," etc.

Now, we have the undisputed fact that the clerk did issue the writ of attachment, and that an affidavit was made,—everything requisite except the evidence of the fact of filing by the indorsement of that fact upon the paper by the clerk. This indorsement is not what is meant by the statute when it says the plaintiff may make and file with the clerk an affidavit. A paper is said to be filed when it is delivered to the

proper officer, and by him received to be kept on file: 13 Vin. Abr. 211; Bouvier's Law. Dict. That the affidavit was delivered to the clerk, and by him received, to be kept on file, is satisfactorily evidenced by the undisputed fact that he issued the writ which the statute only permits "upon filing such affidavit." That he did not indorse upon the affidavit the time it was received, or that he neglected to keep it on file, and attached it, or permitted it to be attached, to the writ, did not affect the validity of the writ, or make it void. The presumptions are, that it was filed with the clerk before the writ issued.

In *Hubbardston Lumber Co.* v. *Covert*, 35 Mich. 254, it was laid down, and supported by authority, that where two acts are to be done at the same time, that shall take effect first which ought in strictness to have been done first in order to give it effect. If the affidavit had been taken from the files without authority, it had been returned thereto again, and was with the files of the case when offered in evidence. No question was made as to its identity. Had there been, it could have been supplied by oral proof. We have had occasion in probate proceedings to disregard objections made to want of the indorsement of the time of filing papers when they were produced from the proper office, and sufficiently identified. The court erred in not admitting the files and records in evidence.

The judgment is reversed, and a new trial granted.

FILING OF PAPERS, WHAT IS, AND EVIDENCE THEREOF. — The word "file" is derived from the Latin *filum*, signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers upon a thread, or wire, for safe-keeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the thread or wire; and, accordingly, under the modern practice, the filing of a document is now generally understood to consist in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file: *Phillips* v. *Beene*, 38 Ala. 248; *Holman* v. *Chevaillier*, 14 Tex. 337; *Gorham* v. *Summers*, 25 Minn. 81; *Naylor* v. *Moody*, 2 Blackf. 247. The most accurate definition of filing a paper is, that it is its delivery to the proper officer, to be kept on file: *County Commissioners* v. *State*, 24 Fla. 55; 12 Am. St. Rep. 183; *Peterson* v. *Taylor*, 15 Ga. 483; 60 Am. Dec. 705; *Powers* v. *State*, 87 Ind. 148; *King* v. *Penn*, 43 Ohio St. 57. Other definitions of similar import may be found, expressed in slightly different phraseology. Thus a document may properly be said to be filed with the town clerk when it is placed in his official custody, and deposited in the place where his official papers and records are usually kept: *Reed* v. *Inhabitants of Acton*, 120 Mass. 131. A paper in a case is deemed to be filed

therein when delivered to the clerk for that purpose, and the clerk's fees paid, if demanded: *Tregambo* v. *Comanche Mill etc. Co.*, 57 Cal. 501. A paper is said to be filed when delivered to the clerk of the court, to be kept with the papers in the cause: *Engleman* v. *State*, 2 Ind. 91; 52 Am. Dec. 494. Filing a paper consists in presenting it at the proper office, and leaving it there deposited with the papers in such office: *Bishop* v. *Cook*, 13 Barb. 326; and when so filed, it is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose: *Lamson* v. *Falls*, 6 Ind. 309. Filing consists simply in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record, of which his office becomes henceforward the only proper repository; and it is his duty, when the paper is thus placed in his custody, or filed with him, to indorse upon it the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern; and that is what is meant by his filing the paper. But where the law requires or authorizes a party to file it, it simply means that he shall place it in the official custody of the clerk. This is all that is required of him; and if the officer omits the duty of indorsing upon it the date of the filing, that will not prejudice the rights of the party: *Holman* v. *Chevaillier*, 14 Tex. 339; *Phillips* v. *Beene*, 38 Ala. 248. This rule seems to be universal in its application to all documents, of whatever nature, which the law requires to be filed. It is generally held that the indorsement or certificate of the clerk upon the paper is not a necessary part of the filing, but only evidence thereof: *Bettison* v. *Budd*, 21 Ark. 578; *Oats* v. *Walls*, 28 Id. 244; *Powers* v. *State*, 87 Ind. 144; *Peterson* v. *Taylor*, 15 Ga. 483; 60 Am. Dec. 705; *County Commissioners* v. *State*, 24 Fla. 55; 12 Am. St. Rep. 183; *Willingham* v. *State*, 21 Fla. 761–789; *King* v. *Penn*, 43 Ohio St. 57; *Haines* v. *Lindsey*, 4 Id. 90; *Nimmons* v. *Westfall*, 33 Id. 221. The principles of law above laid down have been applied to the filing of a location of land for a school-house: *Reed* v. *Inhabitants of Acton*, 120 Mass. 130; to the filing of an indictment: *Engleman* v. *State*, 2 Ind. 91; 52 Am. Dec. 494; *Willingham* v. *State*, *supra;* to a transcript on appeal in a criminal case: *Powers* v. *State*, *supra;* also in an action in ejectment: *Nimmons* v. *Westfall*, *supra;* also to a transcript on appeal from a justice's judgment: *Pinders* v. *Yager*, 29 Iowa, 468; and when such transcript is received by the clerk of the higher court, it is filed, whether he indorses the filing on it or not: *Wescott* v. *Eccles*, 3 Utah, 258; also in a foreclosure proceeding: *Lamson* v. *Falls*, 6 Ind. 309; to a brief of the evidence taken in the trial court: *Peterson* v. *Taylor*, *supra;* to election returns: *County Commissioners* v. *State*, *supra;* a petition in error: *King* v. *Penn*, *supra;* a warrant deputizing an under-sheriff to sell land under an execution: *Haines* v. *Lindsey*, *supra;* an affidavit of death: *Holman* v. *Chevaillier*, *supra;* an assessment list: *Bettison* v. *Budd*, *supra;* demurrers: *Tregambo* v. *Comanche Mill etc. Co.*, 57 Cal. 501; a *remittitur* from the higher court: *Jones* v. *State*, 67 Ga. 240; articles of incorporation: *Johnson* v. *Crawfordsville etc. R. R. Co.*, 11 Ind. 280.

A mortgagee of chattels is not bound to do anything more than to deliver the mortgage to the proper officer and at the proper office, or to any person who has charge of the office. So where the office of town clerk was vacant, and there was a person who had charge of the office, and who received a chattel mortgage left for filing, indorsing on it the date of filing, and placing it among the chattel mortgages in the office, this was held a valid filing: *Bishop* v. *Cook*, 13 Barb. 326. And again, where the clerk was absent, and a clerk in his store, who had charge of the office, received and filed a chattel mort-

gage, this was held a valid filing: *Dodge* v. *Porter*, 18 Barb. 194. The word "filed," as applied to a chattel mortgage, does not include the indorsing and indexing prescribed by the statute, but such mortgage is filed when it is delivered to and received and kept by the proper officer for the purpose of notice mentioned in the statute: *Gorman* v. *Summers*, 25 Minn. 81; *Hathaway* v. *Howell*, 54 N. Y. 97; *People* v. *Bristol*, 35 Mich. 28. In relation to a mortgage, it is held in *Oats* v *Walls*, 37 Ark. 244, that, to secure a party his full rights under the registry laws, the substantial act to be done is to take the writing or instrument, and cause it to be placed on file for record in the office where such instruments are to be recorded, and to pay the fees allowed by law for recording; and such deposit may be made with the person in charge or custody of the office; and being so deposited with a person having control of the office for the time being, it does not devolve upon the party to show that his writing was put in the hands of the recorder or his deputy; the one in charge and performing the duties of the office has sufficient authority for such purpose. The same ruling was made as to a deed in *Cook* v. *Hall*, 1 Gilm. 575. Where the statute requires that the envelope containing the deposition shall be indorsed with the title of the cause and the name of the officer taking the same, and by him shall be transmitted to the clerk of the court where the action is pending, it has been held that while, in strict terms, the title of a case includes the title of the court where the case is pending, yet when the deposition is directed to the clerk of the proper court, and otherwise sealed up, indorsed, and transmitted in due form, the failure to state the title of the court fully, by indorsement, is not sufficient ground to suppress the deposition In other words, this is a sufficient filing: *Whittaker* v. *Voorhees*, 38 Kan. 71.

In order to make a filing valid, it must be shown that the instrument was delivered to the proper officer for the purpose of filing: *Lamson* v. *Falls*, 6 Ind. 309. When the statute provides that a filing fee, payable to the public, must be paid in advance, the instrument is not filed until the fee is paid, though it is left in the custody of the filing officer: *Pinders* v. *Yager*, 29 Iowa, 468. When the filing fee is payable to the officer in advance, he may waive it by receiving the paper without payment, and the paper is filed from the time it is so received: *Tregambo* v. *Comanche etc. Co.*, 57 Cal. 501. A copy of a written instrument upon which a pleading is founded is filed with the pleading if it is set out at length in the pleading itself: *Lamson* v. *Falls*, 6 Ind. 309. Where a clerk certified that certain papers transcribed were true and correct copies of the original paper "among the files" in his office, it was held that though the language was not as definite as it might be, still it was sufficient to warrant the conclusion that such paper being among the files was itself filed: *State* v. *Board of Equalization*, 7 Nev. 83. The verification of a claim against an insolvent estate is not filed, within the meaning of the statute, when it is merely placed by the creditor's attorney in the probate judge's office, in the box appropriated to such papers, without the knowledge of the judge or his clerk, and without calling the attention of either of them to it until the expiration of the time allowed for the filing of such claims: *Phillips* v. *Beene's Adm'r*, 38 Ala. 248. But such a claim is validly filed if a copy thereof is delivered to such judge or his clerk within the time specified in the statute: *Erwin* v. *McGuire*, 44 Id. 499.

Although, as shown above, it has generally been held that the duties in the way of indorsing, recording, indexing, etc., imposed upon the filing officer after the paper has been delivered to him for the purpose of filing, do not constitute any part thereof so far as the party depositing the paper is con-

cerned (*Fanning* v. *Fly*, 2 Cold. 486; *Wescott* v. *Eccles*, 3 Utah, 258; *Pfirmann* v. *Henkel*, 1 Brad. App. 145; *McKenzie* v. *State*, 24 Ark. 636), still some authority is found for the proposition that no paper can be considered as filed until the proper indorsement of the clerk is found thereon; that merely depositing it with the proper officer does not constitute a filing: *Almy* v. *Shelby Co.*, 1 Flip. 104; and that it is the duty of the party depositing the paper to see that the officer makes the proper indorsement thereon: *Ford* v. *Brooks*, 35 La. Ann. 151. In Missouri, it is held that the word "filed," as used in the statute in relation to a bill of exceptions, has a broader signification than the mere indorsement to that effect, and comprehends more especially, in its proper interpretation, the entry made by the clerk on the record, by which the fact that it has been allowed is announced and properly evidenced. It must appear by an entry of record, in the record proper, that the bill of exceptions was filed. Neither the indorsement of the clerk on the bill of exceptions as "filed," nor the statement of the judge that it was signed, sealed, and made part of the record, or both, will suffice. There must be a record entry that it was filed: *Fulkerson* v. *Houts*, 55 Mo. 302; *Johnson* v. *Hodges*, 65 Id. 589; *Pope* v. *Thompson*, 66 Id. 601.

This would seem to be a special rule relating solely to bills of exceptions; for in *Baker* v. *Henry*, 63 Mo. 517, where a report of a probate sale of land was sought to be read in evidence, and objected to on the ground that it was not marked "filed," the court said that it did not regard the objection as well founded, because "the mere indorsement by the clerk on the paper is not the sole constituent element of filing that paper, for, in legal contemplation, the presentation and delivery of the paper to the court or officer is the filing, which dates from its receipt by the clerk and lodgment in his office, although the clerk's indorsement is the highest legal evidence of the filing."

In *Boyd* v. *Desmond*, 79 Cal. 250, an action on a sheriff's official bond for damages for negligence in failing to return an order of sale of mortgaged property, it was held that it was not a sufficient defense to show that the return was found in the clerk's office without a file-mark, among a bundle of papers where loose papers were not usually kept, there being no evidence either in the sheriff's or the clerk's offices showing that a return had been made to or filed in the clerk's office. The court said: "It is contended that it was not necessary to show the filing by the written indorsement of the clerk on the paper, but that the fact might be proved by parol. This may be conceded for the purposes of this case, although we do not wish to be understood as so holding. But if the filing can be proved by parol, the proof must show an actual delivery of the paper to the clerk or to one of his deputies, and the proof should be clear and positive. It is not enough to show the paper in the office of the clerk. It must be delivered to him for the purpose of filing." This ruling is in conflict with the doctrine established by the great weight of authority, that while the certificate of the filing officer, entered upon the paper at the time it is filed, is the best evidence of such filing, still it is not necessary evidence, and in its absence other testimony may be properly received to prove that the paper was duly and properly filed: *Johnson* v. *Crawfordsville etc. R. R. Co.*, 11 Ind. 280; *Peterson* v. *Taylor*, 15 Ga. 483; 60 Am. Dec. 705; *Engleman* v. *State*, 2 Ind. 91; 52 Am. Dec. 494; *Baker* v. *Henry*, 63 Mo. 517; *Bettison* v. *Budd*, 21 Ark. 578; *Willingham* v. *State*, 21 Fla. 788, 789.

While the decision in the California case from which the above quotation was made may have been and probably was correct, under the peculiar circumstances of the case, the language in which the court announced it was, in our judgment, misleading, if not positively erroneous. The benefit of the

well-settled rule, that a paper is to be deemed filed when left in proper official custody for the purpose of filing, must be reduced to its minimum, — indeed it must be substantially destroyed, — if to entitle one to invoke the operation of the rule he must prove clearly and positively an actual delivery of the paper to the officer for filing. After the lapse of any considerable period of time, the circumstances under which a paper was left for filing, or the fact that it was filed at all, must be either dimly remembered or altogether forgotten. Even when remembered, it cannot ordinarily be expected that the person relying upon the paper as filed will be able to ascertain or recollect by whom it was filed, and thus make his testimony availing. The better presumption when the paper is found in the custody of an official with whom it should be filed is, that it was in fact filed with him, and not that it has been surreptitiously, fraudulently, and without any actual filing placed with the other papers there on file.

JOHNSON v. SPEAR.

[76 MICHIGAN, 139.]

MASTER AND SERVANT — DUTY AS TO MACHINERY AND APPLIANCES. — As between employer and his employee, it is the duty of the master to furnish suitable machinery, keep it in proper repair, and exercise reasonable care to prevent accidents. This duty is not discharged by furnishing suitable machinery and appliances in the first instance. The employer must see that they are kept so, and exercise reasonable and proper watchfulness as to their condition, and guard against dangers liable to arise from ordinary wear and use from which they may become weakened or unfit for the purpose for which they are supplied.

MASTER AND SERVANT — DUTY AS TO MACHINERY AND APPLIANCES. — The care required of a master in furnishing safe machinery and appliances for the use of his employees necessarily has relation to the business in which they are engaged, the wear and tear upon the machinery, and the varying exigencies which require vigilance and attention conforming in amount and degree to the circumstances of each particular case.

MASTER AND SERVANT — DUTY AS TO SAFE MACHINERY AND APPLIANCES. — It is not necessary, to entitle a servant to recover for injuries arising from defective machinery, that the master had actual knowledge of such defects. It is enough to show that if he had exercised reasonable care and diligence, he would have ascertained its true condition by examination and inspection.

NEGLIGENCE — DUTY OF OWNER TO KEEP MACHINERY IN SAFE CONDITION — LIABILITY TO THIRD PARTY. — Where the owner furnishes machinery to a contractor while work is being done upon his premises, and injury results through his fault in not keeping it in suitable and safe condition, he is liable to any servant of the contractor for an injury resulting to him from defects therein, and his liability arises out of his obligation to provide safe appliances for the contractor to use, and to keep his premises in safe condition, independent of any contract provision to that effect.

NEGLIGENCE — OWNER'S DUTY TO KEEP MACHINERY AND APPLIANCES IN SAFE CONDITION — LIABILITY TO THIRD PERSONS. — An owner who furnishes a stationary engine on his premises, and the appliances connected

therewith, for hoisting coal, to a contractor, is bound to keep the machinery and premises in safe condition; and is liable for an injury to the contractor's servant resulting from a defect in the machinery of which he knew, or by inspection might have known.

Hayden and Young, for the appellant.

Ball and Hanscom, for the defendant.

CHAMPLIN, J. Johnson was injured while unloading coal from a vessel moored at defendant's dock.

The defendant owns a coal-dock in the city of Marquette, and during the season of navigation large quantities of coal are unloaded thereon from vessels. The vessel crews have nothing to do with unloading the cargoes, which was done by means of a small engine and apparatus belonging to defendant, placed on the dock, and operated by an engineer employed by defendant, by means of which large iron buckets loaded with coal in the hold of the vessel were hoisted out of the hold, elevated to a platform, and dumped into barrows, and wheeled to different places upon the dock.

With the engine, and as a part of the appliance used for hoisting coal, and furnished by defendant, was used a chain about thirty feet long. The links were from five-eighths to seven-eighths inch round iron when the chain was new. One end of the chain was made fast to a drum, the other end being fastened to a rope, which ran through pulleys fastened to blocks in the rigging of the vessel, nearly over the hatchways, and to this rope the buckets were attached, which were filled in the hold of the vessel, and drawn up by the engine to the platform.

The chain would be alternately wound about the drum and unwound in the work of hoisting and lowering the buckets. The weight of a bucket filled with coal is about 250 pounds.

For the last five years the defendant has unloaded at his dock ten thousand tons of coal a year. For the season of 1887 the defendant had a verbal contract with one George Watkins for unloading coal. The defendant testified that "the terms of the contract were: Twenty-one cents a ton on coal taken from the vessel and put on the dock,—shoveled, hooked on, dumped, and wheeled, and put on the dock at my satisfaction, —and twenty-five cents a ton on brick. That is all there was to the contract. I furnished engine, wheelbarrows, planks, platform, and horses. He furnished the shovels. The engine and drum included the chain also. Mr. Watkins hired the men necessary to do the work."

Mr. Watkins also testified that the terms of the contract were, that Mr. Spear should furnish engine, wheelbarrows, planks, and everything except shovels. He (Watkins) hired his own men, and discharged them.

It appears that Mr. Berry, the engineer, worked for Mr. Spear, who also employed a foreman, by the name of Taylor, to see that the work was properly done, but he had nothing to do with the men in unloading. Nothing was said in the contract between Mr. Spear and Mr. Watkins as to who should keep the apparatus used for hoisting in repair and fit for use. Mr. Spear testified that it was his place to buy new chains when the old ones were worn out; that he was to be notified of the need by the contractor; that contractors had nothing to do with the buying of chains; that he received no notification from his contractor, previous to the time of this breakage, that a new chain was needed, and had no knowledge of any defect in this chain which would render it insufficient for the business for which it was used.

It appeared, upon cross-examination, that he had bought five new chains, and never, but one, personally. The others were bought upon the judgment of his foreman, and whenever he thought it necessary for safety. He also testified, upon cross-examination, as follows: "When the chain was mended, I presume the price of mending was charged to me. When a new chain was got, the price was charged to me."

The bearing of this testimony will become evident when the plaintiff's claim is considered. He claims that he was in the hold of a vessel, shoveling coal into a bucket, when, in drawing up or hoisting the bucket, the chain broke, and the bucket fell into the hold, and injured him. He claims that the chain was so worn as to become weakened and dangerous for the purpose, and that it was the defendant's duty, not only to furnish, in the first instance, safe machinery and appliances to do the work of hoisting, but it was his duty to inspect the machinery and appliances, and see that it remained safe and sufficient for the use to which it was applied; that the defendant neglected this duty, and by reason of such neglect the plaintiff was injured.

The plaintiff was not employed by the defendant. He was employed by Watkins. The relation of master and servant did not exist between them, and the plaintiff cannot predicate a right of action based exclusively upon that relation. As between the employer and his employees, it is the duty of the

master to furnish suitable machinery, and to see that it is kept in proper repair, and he is bound to exercise reasonable care to prevent accidents. His duty is not discharged by furnishing suitable machinery and appliances in the first instance, and fit and proper for carrying on the business, but he is in duty bound to see that they are kept so. He must exercise reasonable and proper watchfulness as to their condition, and guard against dangers liable to arise from ordinary wear and use, from which they may become weakened, or unfit for the purpose for which they are supplied.

The care required necessarily has relation to the parties, the business in which they are engaged, the wear and tear upon the machinery, and the varying exigencies which require vigilance and attention conforming in amount and degree to the circumstances of each particular case. It is not necessary, in order to recover for injuries arising from defective machinery, that the master had actual knowledge of such defects, but it is enough to show such facts and circumstances to exist that, if he had exercised reasonable care and diligence, he would have ascertained its true condition by examination and inspection. In such case, it is said that he ought to have known its condition, and he is held to be as equally liable as if he had known it.

Under the contract between defendant and Watkins, it was the duty of defendant to exercise supervision over the engine and its appliances for hoisting, and to inspect its condition, and keep it in a condition so that it would be safe for use in the business of unloading vessels.

The principles above enunciated apply to the relation of master and servant. It does not follow, however, that the defendant is not liable for injuries which may be received by those persons employed by his contractor to unload vessels at his dock. If the injuries result from the negligence of the defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to any servants of the contractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties, but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use, and to keep his premises upon which such servants are at work in a reasonably safe condition, whether the contract provides for it or not: Wood on Master and Servant, p. 699, sec. 337; *Coughtry* v. *Globe*

Woolen Co., 56 N. Y. 124; 15 Am. Rep. 387; *Bower* v. *Peate*, L. R. 1 Q. B. Div. 321, 328.

The contractor, in this case, was employed to do a particular job, continuing throughout the season of navigation; namely, that of unloading coal at twenty-one cents a ton. The defendant furnished the outfit, which included a stationary engine upon his premises, and the appliances connected therewith, in hoisting the coal from the vessels to his dock. The circumstances left the proprietor charged with the duty which regularly attached to him to see that the machinery and appliances so furnished did not endanger the safety of others. Indeed, it could not well be otherwise. It certainly was not the duty of the contractor to repair the engine or machinery, or to buy new chains or ropes to take the place of such as should wear out or become defective; and if it was not the contractor's duty to repair or buy new machinery, and if the duty did not rest upon the proprietor, there would be no remedy for injuries occurring through defects and unfitness of the engine and appliances used in unloading coal for defendant at his dock. The proprietor cannot thus relieve himself from the responsibility: *Mulchey* v. *Methodist etc. Soc.*, 125 Mass. 487.

It is analogous to that class of cases where the owner of real property is held liable to any one who, expressly or impliedly invited upon his premises, is injured by a concealed defect thereon: *Elliott* v. *Pray*, 10 Allen, 378; 87 Am. Dec. 653; *Gilbert* v. *Nagle*, 118 Mass. 278; *Pickard* v. *Smith*, 10 Com. B., N. S., 470; *Holmes* v. *Northeastern R'y Co.*, L. R. 4 Ex. 254; *Powers* v. *Harlow*, 43 Mich. 514; 51 Am. Rep. 154; *Samuelson* v. *Cleveland Iron Mining Co.*, 49 Mich. 164, 170; 43 Am. Rep. 456; *McKone* v. *Michigan Cent. R. R. Co.*, 51 Mich. 601; 47 Am. Rep. 496; *Bennett* v. *Louisville etc. R. R. Co.*, 102 U. S. 580.

The circuit judge charged the jury as follows: "Under this contract the defendant, Spear, agreed to furnish the hoisting apparatus and certain tools, and Watkins to furnish the rest. Among the things that defendant was to furnish was this hoisting apparatus, consisting of an engine, drum, chain, and rope. Under this contract it was the duty of the defendant in the first instance to provide a chain,—for that is all we need to consider in this case; the other machinery is not found fault with,—it was his duty to furnish a chain which was reasonably safe for the business it was called upon to do.

When the defendant, Spear, had done that, he had discharged his duty under the contract between him and Watkins, and towards Watkins's employees. Then the defendant, Spear, was not liable for an accident that resulted from a defect in the chain, provided that it was proper in the beginning, until he was notified that there was a defect in the chain which rendered it unsafe, or, in the absence of notification, until he had actual knowledge that such was the case; for actual knowledge will take the place of any notification from anybody."

I think the court erred in laying down the law as to the extent of the defendant's duty towards persons not in contract relations with him, but who not only had a right to be upon his premises, but who the defendant knew, from the nature of the business which he contracted with Watkins to do, must be employed upon his premises. He knew also that the work they were employed to do was dangerous, unless the machinery and appliances which he owned and furnished were kept in good repair, and free from defects which impaired their strength. He knew that in unloading ten thousand tons of coal a year the chain would have to be wound and unwound at least eighty thousand times if unloading from a single hatch, and forty thousand times unloading from two hatches at the same time. He knew that this constant friction would wear the chain, and the longer it was used the weaker it would get. He testified to there having been five new chains purchased, and there was testimony that on account of the action of the waves, or the listing of the vessel, the buckets were liable to catch upon the hatch or plank of the platform as they were being hoisted, and the chain would be subjected to a strain many times greater than the weight of the coal; and the testimony showed that there had been frequent breakages of the chains used from some cause. Indeed, the frequent purchases of new chains afford strong inference that on account of the wear and use they had become unfit for the service with safety.

The testimony also showed that, in the ordinary work of unloading, the men were obliged to work during the early part of the unloading directly under the ascending buckets, and the nature of their employment and the requirements of their employers would not permit them to stand and watch the ascending bucket until it was safely landed upon the platform, or its contents emptied. Consequently their position was one of danger, unless the machinery and appliances for hoisting were

kept safe. Under these circumstances, I think the duty of examination and inspection rested upon the defendant, and that he would be liable if he knew, or could have known by inspection, of the weak, worn, and insufficient condition of the chain, through which an injury resulted to the men engaged in unloading the vessel.

The judgment must be reversed, and a new trial granted, with costs of both courts.

MASTER AND SERVANT — DUTY OF MASTER WITH RESPECT TO MACHINERY AND APPLIANCES. — The general rule is, that the master must exercise ordinary and reasonable care to provide his servants with safe and suitable machinery, tools, instruments, appliances, and means with which to perform their work: *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526, and note; *Southern etc. R'y Co.* v. *Croker*, 41 Kan. 747; 13 Am. St. Rep. 320.

PEOPLE *v.* PEARL.

[76 MICHIGAN, 207.]

CRIMINAL LAW. — CONVICTION OF ASSAULT AND BATTERY amounts to an acquittal of a charge of assault to do great bodily harm.

CRIMINAL LAW — FELONIOUS ASSAULT — EVIDENCE. — On the trial of a charge of felonious assault, evidence of the particulars of a previous affray with another, at which defendant was not present, and not forming part of the affray with which he is charged, is inadmissible.

CRIMINAL LAW. — ASSAULT WITH A DEADLY WEAPON cannot be justified when the party assaulted is not near or threatening the party committing the assault.

CRIMINAL LAW — SELF-DEFENSE. — Doctrine that homicide is not justifiable, except in cases of necessity, may have some application in other cases of willful and felonious injury.

CRIMINAL LAW — SELF-DEFENSE. — A violent attack is a sufficient excuse for going beyond the mere necessities of self-defense, and chastising the aggressor within bounds not exceeding the provocation.

CRIMINAL LAW — SELF-DEFENSE. — The provoker of an attack runs the risk of suffering to the extent of the natural limits of the provocation offered, although the punishment inflicted extends beyond the necessities of mere self-defense.

C. B. Potter and N. A. Hamilton, for the respondents.

S. V. R. Trowbridge, attorney-general, and George W. Bridgman, prosecuting attorney, for the people.

CAMPBELL, J. Respondents were charged by information with assaulting one William B. Tyler, with intent to do great bodily harm, less than the crime of murder. They were con-

victed of assault and battery, which amounted to an acquittal of the felonious charge.

The case is peculiar in some of its features, and the finding of the jury must have been suggested by legal difficulties in understanding the elements of such offenses. Tyler was very severely punished; but it is hard to see any disposition on the part of defendants to do him permanent injury that would disable him. On the other hand, if they are believed, he gave them great provocation, and attempted to hurt them badly with a weapon. The testimony is not denied that they let him up when he begged them to, which does not indicate much, if any, malice.

The facts in brief were these, colored, perhaps, by circumstances: Tyler and George C. Pearl, the father of defendants, who is an old man, were neighbors. Tyler was a highway officer, and on the day in question was cutting brush and timber near the line. Old Mr. Pearl met him, and while not moving towards Tyler, the latter went up to him with a revolver. The old man attempted to draw a knife, and Tyler knocked him down. There was no testimony indicating that Tyler had any reason to fear an attack. He made the attack himself, and the only pretext he gave was that, some three years before, the old man had used threatening language about him. Proof was allowed by one Brown to testify about such a conversation three years before. All of this was improper, as the attack made by Tyler on the old man was not in presence of his sons, or a part of that affray, and furthermore, it could not be permitted to a man with a deadly weapon to assault another, who was not near him, or threatening him. The reception of the evidence about the old man was injurious, because it gave a color to the subsequent transactions which was not proper.

Upon the second performance of the morning, the parties were directly at variance in their testimony. Tyler swears that he was attacked first, and the defendants swear that they were attacked, or that one of them was attacked, by Tyler. According to Tyler, it was about half an hour after the old man left that the fracas with the sons took place, and he claims he was taken unawares. But there can be no doubt, according to his own testimony, that he then had the revolver in his hand, and if he did, his story is not credible. But, however this may be, there was a rough-and-tumble fight, in which one of defendants got away the revolver, and in the

skirmish he hurt them and they hurt him, and finally they let him up when he said he had enough. Defendants say they went up because they heard an outcry, and feared the old man had been assaulted, and, although they found no one at the place but Tyler, they say he at once made a rush, and began the fight.

It seems to us that the court shut out questions and answers that had a legitimate tendency to explain defendants' position, and that it was also improper to cut short the account of what they said without allowing their whole explanation. But as the charge was erroneous in the main elements of the case, we shall not dwell on the minor questions.

In charging the jury upon what would constitute the statutory offense, the court instructed the jury that if defendants used either a revolver or a stone, such as Tyler swore to, they might be warranted in finding it such a dangerous weapon as would warrant a finding of the statutory intent. Defendants swore that they only used their fists. The jury must have found that they told the truth, and that Tyler did not. And this is manifest from the rest of the charge, in which the whole stress was laid on the right of self-defense. In various forms, but with the same result, the jury were told that the right to defend one's person ends with the necessity, and that even if justified in entering the conflict with Tyler, and disarming him, neither of them would be justified in using force after the necessity ceased to exist, and any further violence would be a battery. And subsequently, the right of self-defense was put on the ground that there was no other reasonable way of escape.

We must assume, as from all the testimony it is hardly possible to doubt, that this whole affair was brought about by the ugliness of Tyler. And, in our opinion, the case did not call for any such discussion of the doctrine of self-defense. Homicide is not justifiable except in case of necessity, and perhaps that doctrine may have some application in other willful cases of felonious injury. But here the defendants were acquitted of any felonious attack. Being merely found guilty of assault and battery, they were entitled to have the question of provocation put to the jury. The law has enough regard for the weakness of human nature to regard a violent attack as a sufficient excuse for going beyond the mere necessities of self-defense, and chastising the aggressor within such bounds as do not exceed the natural limits of the provocation. That

these defendants were not instigated by cold-blooded malice is evident from their releasing Tyler as soon as he gave up. So long as he continued fighting, it cannot be said defendants went beyond reason in fighting also, so long as they did not resort to weapons, as the jury must have found they did not. The only two points put to the jury were: 1. Whether there was an assault with intent to do great bodily harm; 2. Whether defendants exceeded the right of self-defense.

The former the jury acquitted them of. The latter was not necessarily in the case, and if they were assaulted or threatened by Tyler while he was armed—as he admits he was—they were not to be judged on any such narrow doctrine. It would encourage and not restrain violence to allow a man to put the safety of others in danger by actual violence and offensive assaults, and then save himself from punishment by stopping retaliation as soon as his adversaries get the better of him. When a man is provoked by another, the offender runs the risk of suffering to the extent of the provocation; and while the law never sanctions the use of force beyond what was naturally provoked, it does not keep all its tenderness for the wrong-doer who begins the mischief.

While the record requires the conviction to be set aside, the propriety of ordering a new trial depends a good deal on the state of the record. If the jury were right in finding there was no felony, this case should have been tried by a justice. And on the facts before us, the acquittal of the felony indicates very clearly that Tyler's account was discredited, and that the jury had their attention chiefly turned to the case as shown by defendants. The charge of the court, apart from that relating to felony, indicates that defendants were only supposed to be in the wrong for exceeding the bounds of self-defense, when the case does not tend to show that they had not extreme provocation and some necessity of using force. Under all the circumstances, we think public justice would not be furthered by any continuation of this prosecution, and no new trial will be awarded. If the defendants were not the aggressors, they ought not to have been convicted at all, and the verdict indicates, when read with the charge, that they were not responsible for the fight. We have no doubt that such a conclusion was warranted, and would have been reached except for the rulings.

The circuit court must be advised that in the opinion of this court the conviction should be set aside, and the respondents discharged from further prosecution.

SELF-DEFENSE. — As to when one accused of homicide may justify the killing upon the ground of self-defense, and when not: *People* v. *Lennon*, 71 Mich. 298; *ante*, p. 259, and particularly note. As to the right of one, who apprehends apparent danger to himself, to use a deadly weapon in self-defense: *People* v. *Guidice*, 73 Cal. 226, in which the doctrine of self-defense is approved as laid down in *People* v. *Iams*, 57 Id. 115.

FORMER ACQUITTAL OR CONVICTION. — A defendant may be convicted of a lesser offense, provided such lesser offense is included in the greater offense charged: *State* v. *Yanta*, 71 Wis. 669; so that one indicted for rape may be convicted of assault and battery: *Jones* v. *State*, 118 Ind. 39; and one indicted for an assault with intent to carnally know and abuse a child may be convicted of taking indecent liberties with the person of such child: *State* v. *West*, 39 Minn. 321.

But an acquittal or conviction of a lesser offense is a bar to a prosecution for a greater offense of the same nature in which the lesser offense is included: Note to *State* v. *Littlefield*, 35 Am. Rep. 339–345; note to *Roberts* v. *State*, 58 Am. Dec. 544–546; note to *People* v. *Bentley*, 11 Am. St. Rep. 228, 229.

ELLIS *v.* MCNAUGHTON.

[76 MICHIGAN, 237.]

PRINCIPAL AND AGENT — AGENTS' LIABILITY FOR NON-FEASANCE. — An agent who has entire control of the premises and of the erection of a building for his principal is liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises and allowed them to remain in that condition.

PRINCIPAL AND AGENT — MISFEASANCE OF AGENT. — Misfeasance may involve the omission to do something which ought to be done; as where an agent, engaged in the performance of his undertaking, omits to do something which it is his duty to do, under the circumstances; as when he does not exercise that degree of care which due regard for the rights of others requires.

James W. Blakely and Thomas A. Wilson, for the appellant.

W. H. Potts, for the plaintiff.

MORSE, J. The plaintiff was injured on the twentieth day of October, 1885, at the city of Jackson, at a point where the sidewalk had been removed on Main Street, adjoining land then owned by the wife of defendant.

The defendant was engaged in the erection of a building at the corner of Park Avenue and East Main Street. He testifies that he was superintending the work for his wife, but it is clear, from his own testimony, that he had the whole charge and control of the building, and the lot upon which it was being erected. He bought the materials and hired the men, and had

the whole oversight and direction of the building. As he says, he acted as the agent of his wife. Enough of the sidewalk was removed while the building was going on to permit teams to go in from the street to the lot. The wagons, in passing through, made ruts. The plaintiff fell into one of these ruts in the night-time.

The sidewalk, as shown by the record, was first removed by John McNaughton, a grandson of the defendant, who was hauling brick for the building by the thousand. This was done against the protest of the defendant, and his direction that it should not be done. He testifies that he ordered it put down again, and he thinks it was done, and then taken up again. He says: "There was a time that I knew the walk was up. I knew they drove in and out there some. There was no real necessity of its being taken up further than to go across. They could cross with a light wagon, without any trouble."

The walk was taken up some time in the summer, and remained so until after the plaintiff was hurt, when the defendant ordered it put down again.

It was manifest, from the whole evidence, that although the defendant did not direct the taking up of the sidewalk, and would not in the first place consent to its being removed, still he knew it was removed, and permitted it to remain torn up, when he had the power and authority to replace it, or have it laid down again. It is equally clear that his wife had nothing to do with it in any shape, way, or manner.

The court instructed the jury as follows: "Gentlemen, if you believe, from the evidence, that the defendant had charge of the work of putting in the foundation and erecting the building upon the lot in question, and had the care of the premises to which the sidewalk belonged, and that the planks of the sidewalk were removed, although by some persons other than the defendant, and without his direction, but were removed for the purpose of hauling material upon the lot for the construction of the building, and that the defendant had control of the sidewalk, and knew that the opening through it was used for hauling building material upon the lot, and that the sidewalk was in fact out of repair, and in a dangerous condition at the time the accident occurred, and if you further find that the defendant was guilty of negligence in permitting it to be and remain open and out of repair, and in a dangerous condition, and in consequence thereof the plaintiff was injured

without fault on her part, then I instruct you that the defendant would be liable, although the title to the property was in his wife, and the defendant was acting for her in the erection of the building."

The jury found for the plaintiff, assessing her damages at $350.

There are but two assignments of error in this court: 1. That the court erred in not directing the jury to find for the defendant; 2. That the court erred in the instruction given above.

The counsel for the defendant maintain that the defendant was the agent of his wife, and, as such agent, was not liable for the injury to plaintiff.

That permitting the walk to remain as it was, after being torn up by an employee of his wife, his principal, was a non-feasance, and not a misfeasance; that for an omission of duty, or non-feasance, he is liable to no other person than his principal; that the authorities are uniform that, when an agent neglects to perform a duty which his principal owes to third persons, who are thereby injured, their remedy is against the principal, and not the agent.

We are satisfied that the instruction of the court was correct, and there was sufficient evidence to support the finding of the jury.

The defendant had the entire control and management of the erection of the building and the premises, the same as if it had been his own; and the record fails to show that his wife had anything to do with it, except to consult with him as to the plan of the building. He testifies that all the work and materials were paid for with her money, but he did the hiring, buying, and paying. The wife did not exercise any control or management about the erection of the building in any way.

The negligence charged in the declaration was not alone the tearing up or removal of the walk, but also in allowing it to remain torn up and in a dangerous condition from April until the time of the injury.

Every day it was so permitted to remain, when the defendant had the entire control of it, and the authority without question to replace it, was a wrong and a misfeasance. It was his duty, knowing that the walk was removed, being present and having complete control of the work, to have it put down again, and made reasonably safe for travel.

Chief Justice Gray, in *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437, says: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. . . . . But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing, but it is misfeasance,—doing improperly."

In the case before us, the defendant had entered upon the work of erecting this building. One of the men whom he engaged to haul brick for the building took up this walk without his consent, and, for the purposes of this case let it be said, against his orders. But, knowing it to be taken up, and dangerous, he leaves it in this dangerous condition from day to day, and permits the men in his employ and under his control to drive through it, making it still more dangerous. He was bound to use reasonable care in the erection of this building, so as not to cause injury to third persons. The using of this spot to drive teams through into the lot, with his knowledge and tacit permission, to say the least, as he could easily have forbidden it and replaced the walk, was, in law, his act, and he must be held responsible for the consequences of it.

To say that he only was guilty of a non-feasance—an omission of duty to his principal—does not cover the case. He not only omitted a duty he owed to the traveling public, but, by his acts, he increased the danger, and every day committed a wrong, and was guilty of a misfeasance, in keeping this walk torn up, and using it as a drive-way, in the execution of a particular work which he had entered upon, and of which he had complete superintendence and control.

Irrespective of his relation to his principal, he was bound, while doing the work, to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve, to some extent, the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances; as, for instance, when he does not exercise that

care which a due regard for the rights of others would require. This is not doing, but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable: Mechem on Agency, sec. 572.

The judgment must be affirmed.

EMPLOYER AND EMPLOYEE — NEGLIGENCE OF EMPLOYEE. — Where a foreman has exclusive control over a building and its construction, standing in the place of his employer, any negligence of such foreman causing injuries to a workman casts the responsibility therefor upon the employer, unless the injured man is barred by contributory negligence: *Slater* v. *Chapman*, 67 Mich. 523; 11 Am. St. Rep. 593; for a principal is responsible for the negligence of his agent, to whose care he intrusts the entire charge of his business: Note to *Slater* v. *Chapman*, 11 Id. 596.

PRINCIPAL AND AGENT. — An agent is personally liable for injuries resulting from his negligence, which amounts to a misfeasance: *Bell* v. *Josselyn*, 3 Gray, 309; 63 Am. Dec. 741, and cases in note 742; compare *Campbell* v. *Portland Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503; *Jenne* v. *Sutton*, 43 N. J. L. 257; 39 Am. Rep. 578.

But an agent having charge of real estate is not liable for an injury sustained by a third person by reason of the agent's neglect to keep the premises in repair: *Delaney* v. *Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456; compare *Bissell* v. *Roden*, 34 Mo. 63; 84 Am. Dec. 71, and particularly cases in note 76, which seem to be contrary to the rule as laid down in *Bell* v. *Josselyn*, 3 Gray, 309; 63 Am. Dec. 741.

SERVANT'S LIABILITY TO FELLOW-SERVANTS FOR NEGLIGENCE: Note to *Albro* v. *Jaquith*, 64 Am. Dec. 58–60.

COVILLE *v.* BENTLEY.

[76 MICHIGAN, 248.]

EXECUTIONS — EXEMPTIONS. — SALE OF EXEMPT PROPERTY is void, and those participating therein are trespassers.

EXECUTIONS — LIABILITY OF INDEMNIFIED OFFICER FOR FAILURE TO LEVY ON EXEMPT PROPERTY. — An officer, although indemnified, is not bound to levy, if in good faith he believes the property exempt, or that the levy would be illegal.

EXECUTIONS — LIABILITY OF OFFICER FOR FAILURE TO LEVY. — The defense that there was no property to be found liable to seizure belonging to the judgment debtor named in the execution is always open to the officer, whether indemnified or not, and is a good defense in an action for refusal to levy.

EXEMPTIONS — WHO MAY CLAIM. — Where partners each claim the statutory exemption in a stock of goods, and it is shown that one of them is a car-

penter, and works more or less at his trade as such, counsel have a right to go to the jury on the theory that his principal business is that of a carpenter, and that therefore he is not entitled to any exemption in the stock of goods.

James H. McDonald, for the appellant.

Walter Barlow, for the defendants.

MORSE, J. This is an action brought upon a constable's bond, under section 6988, Howell's Statutes.

The plaintiff in this suit, on the fifth day of December, 1885, began an attachment suit against Daniel S. Hibbard and Carrie V. Hibbard. The writ was placed in the hands of the defendant Bentley, who was a constable in the township of Monguagon, Wayne County.

Under the writ, Bentley levied upon certain goods belonging to the Hibbards, and held them by virtue of the same until judgment was rendered in the attachment suit. Execution was issued on the judgment, and put in the hands of Bentley, who levied on the same goods under such execution. Before Bentley made the last levy he demanded a bond of indemnity from plaintiff, which was given, as plaintiff testifies, upon the express condition that Bentley would go on and make the levy. After Bentley made the levy under the execution, he advertised the goods for sale. He postponed the day of sale twice, and finally returned the goods to the Hibbards, against the protest and without the consent of plaintiff.

It appeared on the trial of this case in the court below that Carrie V. Hibbard carried on a millinery store, and the goods levied upon and afterwards surrendered up to her by the constable, Bentley, were millinery goods. The defendants gave evidence, under plaintiff's objection, that Daniel S. Hibbard was the father of Carrie V., and in partnership with her in business. and that the goods belonged to their stock in trade, and was all they had, and not over three hundred dollars in value, and therefore exempt.

The constable testified that he returned the goods on demand, because he found they were exempt.

The court instructed the jury that if the Hibbards were in copartnership, and these goods were not worth over five hundred dollars, and were their stock in trade, they would be exempt, and the plaintiff could not recover; if the jury did not find these facts, the plaintiff was entitled to a verdict. The jury found for the defendants.

It is contended by plaintiff's counsel that the defendant Bentley, having demanded and obtained from the plaintiff a bond of indemnity, was thereby estopped in this suit from making the defense that the goods were exempt. In other words, that Bentley was bound to proceed to levy and sale of these goods, even if he knew they were exempt, or else, under the statute, pay to the plaintiff the amount of the judgment, and interest, against the Hibbards.

We do not think this contention correct. If the goods levied upon were exempt, it could have been of no benefit to plaintiff to sell them under the execution, as the sale would have been void, and those participating in it trespassers. Nor was the defendant Bentley, because he had demanded and received a bond of indemnity, bound thereby to commit a trespass, and subject himself to damages.

An officer, although indemnified, is not bound to levy, if, in good faith, he believes such levy would be illegal, and can maintain its illegality when sued upon his bond. The defense that there was no property to be found liable to seizure, of the judgment debtor named in the execution, is always open to the officer, whether indemnified or not, and is a good excuse in an action for refusal or neglect to levy.

But the court erred in stating to counsel that "they need not argue to this jury that Hibbard's principal business was that of a carpenter, as there is no evidence that he had any tools of the value of $250."

There was testimony tending to show that Daniel S. Hibbard was a carpenter, and worked more or less at his trade as such; that Miss Hibbard did all the work in the store; and that her father was away at work at his trade when he could get work; and that his principal business for many years had been that of a carpenter; that he had a few tools, and worked by the day. The value of the tools was not shown, nor do we think it was material.

The counsel had the right to go to the jury upon the theory that his principal business was that of a carpenter, and to establish such fact, if he could. If so, only $250 of the millinery goods would have been exempt, to wit, the exemption of Miss Hibbard, no matter what his tools or stock in trade as a carpenter was worth.

The judgment of the court below is therefore reversed, and a new trial granted, with costs.

DUTY AND LIABILITY OF OFFICER UPON RECEIVING A BOND OF INDEMNITY. — When an officer, before or after the levy of an execution or writ of attachment, demands and accepts of the plaintiff a bond indemnifying him against any loss or damage he may sustain by reason thereof, he is bound, at his peril, to sell the property seized, whether it belongs to the judgment defendant or not: *Fitler* v. *Fossard*, 7 Pa. St. 541; 49 Am. Dec. 492; *Watmouth* v. *Francis*, 7 Pa. St. 206–215; *Corson* v. *Hunt*, 14 Id. 510; 53 Am. Dec. 568; *Van Cleef* v. *Fleet*, 15 Johns. 147; *Waterman* v. *Frank*, 21 Mo. 108; *Evans* v. *Thurston*, 53 Iowa, 122; *Connelly* v. *Walker*, 45 Pa. St. 449; *Harrison* v. *Allen*, 40 N. J. L. 556; *Stone* v. *Pointer*, 5 Munf. 287. "Unless he is so bound, the giving of the bond by the creditor is a vain ceremony. He is not only so bound, but he is sheltered from any action by the party claiming the property, unless the obligors in the bond prove insolvent." "Where he has received adequate security, or a tender of it, he is bound to go on, or to hold back at his peril. It has been said that a contract of indemnity for selling goods known to him to be the property of a stranger would be illegal and void as a contract to violate the law. Not so. What he supposes to be knowledge may be no more than opinion, and possibly an erroneous one; but the execution creditor may entertain a different opinion, and consequently be entitled to have its accuracy tested by experiment at his own cost": *Fitler* v. *Fossard*, *supra*. It has been held that though a statute permits a delivery bond to be given for property seized, it does not deprive a third party of a trial of a claim of right, but the execution plaintiff may compel the officer, upon giving an indemnity bond, to proceed and sell notwithstanding a verdict in favor of the claimant: *Waterman* v. *Frank*, 21 Mo. 108; *Van Cleef* v. *Fleet*, 15 Johns. 147; *contra*, *Fisher* v. *Gordon*, 8 Mo. 386. The phrase that the officer upon being indemnified is bound to sell "at his peril," has thus been explained in *Lummis* v. *Kasson*, 43 Barb. 373–376: "It was held, however, by the supreme court of this state in *Bagley* v. *Bates*, 8 Johns. 185, and *Van Cleef* v. *Fleet*, 15 Id. 147, that if the plaintiff in the execution tenders a sufficient bond of indemnity to the sheriff, an inquisition will not justify that officer in returning that the defendant has no goods, if the fact turn out to be otherwise. This is upon the ground that the inquisition is not conclusive of the right of property, but is merely designed to protect the officer, and the indemnity, when tendered, has the same effect. But even after a levy and inquisition finding the goods to be the property of the defendant, I apprehend the sheriff is at liberty to return *nulla bona*, provided he acts in good faith, but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return; and I think it reasonable to hold that he may make the same return after indemnity, but in so doing he assumes the like responsibility; and this is what is meant by the expression in the books, that in such cases he acts at his peril." In this case it was held that after an officer has seized property under a writ of attachment, and has advertised it for sale under the execution issued in the case, upon receiving indemnity from the execution plaintiff, he may make return on the execution *nulla bona* when the property is taken out of his possession, provided he acts in good faith, but in so doing he assumes the responsibility of proving the property out of the execution defendant, and thus supporting his return.

It seems to be the general doctrine that the fact that the officer has received a bond of indemnity does not subject him to liability for a surrender of the property or refusal to levy, if such property was in fact not really subject to the execution: *Lummis* v. *Kasson*, *supra*; *Commonwealth* v. *Wat-*

mough, 6 Whart. 117; *Commonwealth* v. *Vandyke*, 57 Pa. St. 34; *Hamblet* v. *Herndon*, 3 Humph. 34. But in all such cases the burden of proof is on the officer to show affirmatively that the property was not in the execution defendant or was not subject to levy. The rule is thus laid down in *Wadsworth* v. *Walliker*, 45 Iowa, 395; 51 Id. 605. An officer holding property in his possession under attachment may, in his discretion, release the same upon the claim of a third party to its ownership; but the officer does so at his peril, and the burden of proof is on him to establish that the attached property does not belong to the execution defendant, or is not liable to seizure. To the same effect, *Freiberg* v. *Johnson*, 71 Tex. 558. So a sheriff levying on property, and to whom is given a bond of indemnity by the plaintiff, is not bound to sell at all hazards; but, upon refusing to sell, he assumes the burden of proving affirmatively that the judgment debtor had no title to sell: *Jackson* v. *Daggett*, 43 Hun, 647.

When an officer has taken an ample bond of indemnity from the execution plaintiff to relieve him from liability for selling, and he has proceeded to sell goods not belonging to the execution defendant, he must look to the bond as security against the claims of third parties, and he cannot, in an action against him by the execution plaintiff to recover the amount realized from the sale, set up the title of a third person to the property sold, unless he has been sued by the adverse claimant, and recovery has been had against him for wrongfully selling the property: *Adams* v. *Disston*, 44 N. J. L. 662; *Newland* v. *Baker*, 21 Wend. 264.

A distinction has been drawn between the liability of an officer levying an attachment after indemnity has been given, and his liability under the same circumstances when levying an execution. Thus it has been determined that, in the former case, by showing sufficient cause for the release or surrender of the attached goods, he may relieve himself from liability: *Wadsworth* v. *Walliker*, 45 Iowa, 395; 51 Id. 605; while in the latter case he is estopped by receiving the bond of indemnity from relieving himself from liability for failure to subject the property to the execution, and will not be permitted to prove that it was not in fact the property of the execution defendant: *Evans* v. *Thurston*, 53 Id. 122; *Corson* v. *Hunt*, 14 Pa. St. 510; 53 Am. Dec. 568.

BUTZ *v.* OHIO FARMERS' INSURANCE COMPANY.

[76 MICHIGAN, 263.]

INSURANCE ON MORTGAGED PROPERTY — EFFECT OF FORECLOSURE. — Where insurance is taken on mortgaged property with knowledge that the mortgage is overdue, and through an accidental omission on the part of the agent the insurance is not made payable to the mortgagee, the insured being ignorant of the English language, and relying upon the agent, the mere commencement of foreclosure proceedings will not avoid the policy, notwithstanding it provides that it shall become void if any proceedings are taken to foreclose a lien upon the property.

Barkworth and Cobb, for the appellant.

T. W. Atwood, for the plaintiff.

Campbell, J. Plaintiff recovered below on a policy of fire insurance, the defense set up being a forfeiture under a mortgage. The policy contained provisions to the effect that if the prperty be "sold or transferred or encumbered by mortgage or otherwise without the written consent of this company, or if proceedings to foreclose any lien shall be commenced in any way, or notice thereof shall be given, or if said property, or any part thereof, shall be levied upon, or any changes take place in the title or possession, whether by legal process, judicial decree, or voluntary transfer, then, and in every such case, this insurance shall be void."

The breach of condition alleged was, that, before the loss, proceedings were taken to foreclose a lien.

The policy was dated September 18, 1886, and was to run till September 18, 1889. The loss was on April 14, 1888. The foreclosure suit was begun August 25, 1887, in chancery, and a decree was rendered in September, 1887, for a sale after September 1, 1888.

It appeared that Mr. Gibbs, defendant's local agent, had insured the same premises before in other companies, and had been fully informed of the mortgage, and had made the insurance payable to the mortgagee as her right should appear. It is also shown by the testimony of Mr. Gibbs that the omission of that clause in this policy was accidental, and not intended. Plaintiff testified to his own ignorance of English, and his reliance on the agent for correct information, which he claims was not given him. The mortgage had been overdue for some years before the policy was issued.

We do not see any essential difference between this case and that of *Michigan State Ins. Co.* v. *Lewis*, 30 Mich. 41, 47, 48. The mortgage was known to be overdue, and liable to foreclosure at any time, while the mortgagor could not be deprived of any of his possessory rights or rights of redemption until the sale, which could not be earlier than the fall of 1888. There could be no change affecting title or possession till that time, and there could be very little object in procuring and paying for insurance that might be avoided within twenty-four hours if the defense is available. It was said in that case that the mere commencement of a foreclosure under such circumstances would not avoid the policy, and we are not inclined to depart from that doctrine.

It is unfortunate that the record does not show more fully the documents relied on. It is left in doubt by the return

whether the defendant was not notified in writing of the whole title, and of the purpose to protect the mortgage interest. But we have enough to show that the existence of the mortgage was not, by itself, of any effect in impairing the policy, and the destruction of it by the beginning of foreclosure would be a consequence not reasonable, and not to be inferred without convincing provisions, which we do not discover, as changing the former decision of this court.

We think the judgment should be affirmed.

INSURANCE. — If the policy requires the statement of certain facts, and their expression in the policy, and the insured states the facts to an agent, but the agent does not insert them in the policy issued, the omission cannot be allowed to prejudice the insured: *Lycoming Fire Ins. Co.* v. *Jackson*, 83 Ill. 302; 25 Am. Rep. 386.

INSURANCE. — Where a woman, ignorant, and unable to read English, procured insurance upon property owned by her children, but in which she had a dower interest, and it appearing she did not know the distinction between "dower" and "fee," and was ignorant of the provisions of the policy stipulating for a forfeiture if the assured did not own in fee the insured property, the policy was valid, where the agent had knowledge of the facts, and there was no fraud on the part of the assured: *Hartford Ins. Co.* v. *Haas*, 87 Ky. 532; compare *Baker* v. *Ohio Farmers' Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and note; *Home Mutual F. Ins. Co.* v. *Garfield*, 60 Ill. 124; 14 Am. Rep. 27.

McALLISTER *v.* DETROIT FREE PRESS COMPANY.

[76 MICHIGAN, 338.]

LIBEL. — PUBLICATION OF NEWSPAPER ITEM CONFESSEDLY UNTRUE IN SEVERAL PARTICULARS, all of which tended, in the connection used, to carry the impression that the parties named therein were guilty of felony, is clearly libelous *per se*, and the question for the jury is only one of damages.

LIBEL. — NO NEWSPAPER HAS ANY RIGHT to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and business without answering for the libel in damages, and the greater the circulation of the paper the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items.

LIBEL. — NEWSPAPER REPORTER HAS NO RIGHT to collect stories on the street, or gather information from policemen or magistrates out of court, about a citizen, to his detriment, and to publish them as facts in his newspaper. If true, such publication may be privileged; but if false, the newspaper is responsible to any one who is wronged thereby.

LIBEL — FALSE PUBLICATION OF ARREST AND IMPRISONMENT. — A party cannot be subjected to the wrong and outrage of a false publication of his arrest and imprisonment, looking toward his guilt, without remedy; and no excuse of the demand of the public for news, or of the peculiarity

and magnitude of newspaper work, can avail to alter the law so as to leave the injured party without redress and recompense for a wrong, which, under the law, can never be adequately compensated to one who values his reputation more than money.

Libel — Privileged Communications. — The truth is privileged when published from good motives and for justifiable ends, and that which is not true, but honestly believed to be true, and published in good faith by one in the performance of public or official duty, in certain cases, is also privileged.

Libel — Privileged Communications. — Communications made to a body or officer having power to redress a grievance complained of, or having cognizance of the subject-matter of the communications, to some intent or purpose, are privileged, and so in cases where the communication is made confidentially, or upon request, where the party requiring the information has an interest in knowing the character of the person inquired after. So a person may be justified when honestly endeavoring to vindicate his own interests, as in a case of slander of title, or guarding against any transaction which might operate to his own injury.

Libel. — Liberty of the Press, as the law now stands, is only a more extended and improved use of the liberty of speech prevailing before printing became general; and, independent of statute, the law recognizes no distinction in principle between a publication by a newspaper and a publication by any other person. A newspaper is not privileged, as such, in the dissemination of the news, but is liable for what it publishes in the same manner as any other individual.

Corliss, Andrus, and Leete, and Edwin F. Conely, for the appellant.

F. A. Baker, for the defendant.

Morse, J. On Saturday, February 11, 1888, the plaintiff and one Lester B. French, two reputable citizens of Detroit, crossed over to Windsor. French went to Windsor to dispose of about twenty-seven dollars of Canadian postage-stamps which he had purchased of Dr. Kennedy, of Detroit. McAllister went with French, because the latter asked him to, and did not know what was the object of French's visit.

After they arrived at Windsor, they met a Mr. Ronald, who resided there, and walked up to the Manning House, which was soon to be opened, for the purpose of looking through it, having been invited to do so by Mr. Ronald. When they got there, the house was locked, and Mr. Ronald had no key to it. From there they went to the post-office. French went to the stamp-window, and asked the gentleman there, who proved to be the assistant postmaster, if he would take some stamps "that had been sent to us on the other side"; told him that he got the stamps from a physician on this (American) side. The man said (so French testifies, and it is not disputed):

"No, we cannot take them here"; and directed him to a book or stationery store a few doors below. McAllister stayed in the post-office until French was through, but did not know what the latter was doing.

From the post-office they went to the book-store. French explained at this store how he came to have the stamps, and offered them for sale. The man at the store said he had so many on hand he could not use them, and directed French to another book-store. They then went to the second book-store, where French sold about ten dollars' worth of stamps, at a discount of from three to five per cent. Before going to this store, they stopped at another place, where French offered stamps for sale, but sold none. McAllister knew what French was doing after they left the post-office. French might have sold all his stamps at the book-store at ten per cent discount, but declined to do so.

As they came out of this store, they were arrested, and taken to jail by a policeman, accompanied by the assistant postmaster. McAllister wanted to know what the trouble was, — what they were arrested for, — but received no answer. French said: "If there is anything wrong, if you will take us to the telephone we will identify ourselves. Here is the man that owns this hotel here. I can telephone to him; he is on the other side of the river, and will come over. I am well acquainted with business men over there, and we will satisfy you that everything is all right." The officer answered: "That don't make any difference. Go with us, and we will take you to a telephone all right."

They were not taken to a telephone, but to the jail, where they were searched, and everything taken from them. They told the officers that they lived in Detroit, and who they were. The effects upon them, — letters, the monogram upon McAllister's watch, and a bank-book in the possession of McAllister, — corroborated their story, but it was of no avail. The chief of police, Bains, came to them at the station dressed in citizen's clothes, and asked French where he got the postage-stamps. French asked him, "Who are you?" to which Bains replied, "None of your business." French then said: "Then it's none of your business where I got them." Thereupon Bains fell into a passion, and locked them up in different cells.

After they were locked up, Bains asked them who they were, and if they knew any one in Detroit. McAllister told

him where he lived; that he boarded at the Antisdel House, but had been away from there. He wished to send for Mr. Andrus, his attorney, but this was denied him. Bains asked: "Do you know any detective in Detroit?" They could not think of any, and then Bains said, "If you don't know any detective in Detroit, you don't live there," and went away. They were put in jail about half-past twelve, and remained there until about seven, P. M. About three, P. M., detectives McDonell and Noble came over from Detroit, and were asked if they knew them, and McDonell said he knew McAllister well, and related that when McAllister's house was robbed he looked up the case for him. He also said that he had seen Mr. French, but could not place him, but knew his face well. McAllister said to Bains: "You have found nothing at all suspicious on me. Can't you let us sit in the office, instead of putting us in the cell again?"

But Bains said: "No; you go right back in there."

He refused to let them occupy the same cell. French told Bains that he got the stamps of Dr. Kennedy.

Bains came in at one time with a piece of paper in his hand, and said: "French, you are a liar. I have telegraphed to Dr. Kennedy, and he says he don't know you."

Bains let French go to the telephone at one time, but for some reason he could not get Detroit; and Bains said: "Come away from there. I guess you don't want to get them very bad, anyway."

It seems that Mr. Wigle, the postmaster, made a complaint before Alexander Bartlett, the police magistrate at Windsor, against French and McAllister, for the unlawful sale of postage-stamps, under a Canadian statute reading as follows:

"No person other than a postmaster shall exercise the business of selling postage-stamps or stamped envelopes to the public, unless duly licensed to do so by the postmaster-general, and under such conditions as he prescribes; and every person who violates this provision by selling postage-stamps or stamped envelopes to the public, without a license from the postmaster-general, shall, on summary conviction, incur a penalty not exceeding forty dollars for each offense": 38 Vict., c. 7, sec. 74, being R. S. Can., c. 35, sec. 106.

Neither French nor McAllister had any knowledge of this statute, or that they were doing anything wrong in selling or offering these stamps for sale.

The complaint was read to French and McAllister, who were taken before the magistrate for that purpose; but the magistrate swears that Mr. Wigle was convinced, by the time the complaint was read, that they were innocent of any intentional violation of the law, and withdrew it. No complaint was made against them for any other offense. There was some talk between Mr. Wigle and the magistrate about the robbery of a post-office at Bothwell, Ontario. The magistrate could not swear that the chief of police informed him that he suspected these men of that robbery, but thinks it quite probable that he did. There was, the magistrate says, no hearing or adjournment on the complaint made by Wigle. Wigle withdrew it, and that was the end of it, as far as the magistrate was concerned. It was withdrawn between three and four o'clock, P. M.

But Mr. Bains, as they testify, kept these men incarcerated until after six o'clock, P. M., and told them then that he was not quite satisfied, but they could go if they would come back at nine, A. M., on Monday. On Monday they went over, and were told they were not wanted. Bains swears that he did not require them to return on Monday, but released them unconditionally. While in Canada, French and McAllister received no intimation from any one that they were suspected of the Bothwell robbery, and knew nothing about it.

The Detroit Free Press (daily), on Sunday, February 12, 1888, contained a number of items of news under the heading of "Windsor." In these items, and the third one in the list, appeared the following: "A week ago, it will be remembered that a safe was cracked in Bothwell, and that two thousand dollars in money and about thirty dollars' worth of stamps were stolen. Yesterday two hard-looking citizens canvassed the entire business part of Windsor, in the effort to sell stamps at half-price. They at last tried to sell the stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found thirty dollars' worth of stamps. They gave their names as Edward H. McAllister and Lester B. French. Chief Bains will hold them to await developments."

On Tuesday, the 14th of February, 1888, under the heading of "Windsor," the Daily Free Press published, with other items of news, the following: "Edward H. McAllister and Lester B. French, the men who were arrested on Saturday for trying to dispose of stamps at half-price, have been released,

as there was no evidence to show that they are the men who are wanted at Bothwell."

It is not shown that the Free Press ever made any other or further allusion to the matter. The plaintiff brought suit against the Free Press company for libel, declaring upon the first publication.

The defendant pleaded the general issue, and gave notice that on the fourth day of February, 1888, the post-office building at Bothwell, Ontario, was feloniously broken into and entered by a person or persons unknown, who did then and there steal Canadian postage-stamps of the value of thirty dollars, and also money, jewelry, goods, and other personal property of the value of two hundred dollars; and that on the eleventh day of February, 1888, the plaintiff went to Windsor, with a companion, and offered for sale a quantity of Canadian postage-stamps, of the value of about thirty dollars, and that among other persons to whom he offered them was the assistant postmaster at Windsor; that said assistant postmaster reported the facts of said burglary and larceny at Bothwell, and the attempt of said plaintiff and his companion to sell about the same quantity of postage-stamps, to a police-officer at Windsor; that, upon such information, said police-officer had reasonable cause to suspect the said plaintiff and his companion to have been guilty of the felony aforesaid; and that thereupon the said police-officer, by virtue of his power as such officer, arrested the said plaintiff and his companion, and took them before Alexander Bartlett, a police magistrate in Windsor, to be dealt with according to law. "And the said defendant will further insist and prove that if it published the alleged libelous article set forth in the plaintiff's declaration, the same was a true and correct account of the said felony, and of the arrest of the said plaintiff and his companion by a police-officer, on his suspicion that they were guilty of said felony; and said article was and is, in that sense, a true and correct statement of the facts, and was published as a privileged publication, and for good purposes and justifiable ends."

Upon a trial had in the circuit court for the county of Wayne, before a jury, Hon. C. J. Reilly, the presiding judge, directed a verdict for the defendant, and judgment passed accordingly.

It is to be presumed that the trial judge held the publica-

tion to have been privileged, no reason being stated in the record for his action.

In addition to the facts of the arrest, as hereinbefore stated, the plaintiff showed that he then lived in Bay City, Michigan, where he had resided since October 16, 1888. Previous to that time he had lived in Detroit fourteen months; two years before that in Chicago; eight months before going to Chicago in Flint, Michigan; and for twenty-three years before living in Flint he had resided in Detroit steadily, and for twenty years at one place,—244 Park Street. At the time of his arrest he was dealing in and owner of real estate in Detroit; and French, his companion, was also in the same business, and had an office on Griswold Street.

Plaintiff first saw the article in the Free Press on the afternoon of February 12, 1888. Heard some parties speaking about it at the house where he boarded. After the publication, people halloed to him upon the street in different ways, and he also received letters in relation to it. At the time he was searched he had two fifty-cent American pieces, and two five and one three dollar gold pieces, a diamond ring, and about fifty dollars in money, including the gold pieces.

The defense showed the commission of the robbery at Bothwell by some unknown person on the night of February 4, 1888. William Regan, the postmaster at that place, testified that he discovered the robbery the next day, and at once notified the post-office inspector at London, Ontario. Bothwell is about sixty miles from Windsor. Regan testified that about $110 of Canadian postage-stamps were taken, and about $80 in money,—gold, silver, and bills,—$194 in all, stamps and money. Some jewelry was also taken,—a watch-chain and some charms,—and some gold pieces,—one five-dollar, one two-and-a-half-dollar, and two one-dollar gold pieces. The five-dollar piece was an American coin.

The defendant proved by Bartlett, the magistrate, that this robbery at Bothwell, under the laws of Ontario, was a felony, and the selling of stamps without license a misdemeanor. It also appears from his testimony that the complaint was withdrawn before McAllister and French were required to plead to it.

William Bains, the chief of police, was also sworn on behalf of the defendant. His main evidence was given in the attempt to justify his conduct towards the prisoners while in his charge, in which he was not successful. He testified that he gave no

directions to have them arrested, and first saw them at the lock-up, where he went after hearing of their arrest. Before their arrest he had received from Mr. Parker, the post-office inspector at London, the following letter:—

"Post-office Inspector's Office.

"London, 7 Feby., 1888.

"*Dear Sir*,—I beg to inform you that on the night of Saturday, fourth inst., the Bothwell P. O. was burglarized, and some $200 in cash and postage-stamps stolen from the safe. There was also a quantity of jewelry taken, the property of the postmaster's wife, consisting of 1 gold chain, long, with fancy link; 2 lockets, silver, — one with gold chain attached; 2 gold pencil-cases; 1 $5 gold coin; 1 $2.50 do.; 2 $1 do.; 1 sovereign, with a hole in it, and the name 'Ella Rose' stamped across the face; 1 25c gold coin. I will feel obliged if you will have such inquiry made by your staff for the stolen goods as you may deem necessary, as they may be offered for sale in your locality. Yours truly,

"R. W. Parker, P. O. Inspector.

"Mr. Bains, Chief of Police, Windsor."

He was present when French and plaintiff were searched, and saw the articles found upon them, and after they were locked up reported the case to Mr. Bartlett.

He testifies that the finding of the stamps and the gold coins upon their persons, and the letter he had received from Parker, led him to believe or suspect that these men might have had something to do with the Bothwell robbery; that he sent an officer over to Detroit to find out about them, and to see Dr. Kennedy; that the officer returned about six o'clock, P. M., and reported that the doctor said he had sold the stamps to French, and also that he had been to the magistrate, Bartlett, who instructed him to release them.

On cross-examination Bains testified:—

"Q. Did you have any talk with the newspaper reporters about this matter? A. When these gentlemen left, one of them — I can't say which — turned and said to me: 'Don't give this to the papers. We don't want this in the papers'; and I said: 'Gentlemen, they will not get it from me.' That is what passed. Shortly after they passed through the front door, a reporter came to me and asked me about this matter, and I said: 'The gentlemen are released. It appears there is nothing against them, and I was requested not to let the

papers have it.' Who that reporter was there for I can't tell you.

"Q. Do you know his name? A. No, sir, I don't; and I don't know what paper he was for.

"Q. You can't say whether he was a reporter for the Detroit Free Press? A. I don't know. That is the only reporter I spoke to about it."

The policeman who arrested them testified to arresting them on information that they were selling stamps at less than their face value. He knew about the Bothwell robbery. The assistant postmaster told him of this, and pointed the men out to him. He also knew of their trying to sell the stamps at two other places. He claims he arrested them on suspicion of the Bothwell robbery. He swears he did not talk with or give any information about the affair to any reporter.

Ira W. Quinby, exchange editor of the Free Press, testified that at the time of the publication of the alleged libel he was a reporter for that paper, and had been "doing" Windsor in that capacity for about two years. He wrote both the items published in the Free Press in relation to the arrest of French and plaintiff. He was in Windsor on the day of such arrest, and was in Bartlett's court-room about three o'clock, P. M., as near as he could remember. While there he heard a conversation between Mr. Bains and the magistrate. He had no coversation with Bains, but talked some with Bartlett. He was not acquainted with plaintiff or French, and saw them for the first time when he testified. He wrote the item about six o'clock, P. M., and handed it to the city editor of the Free Press. He was not in Bartlett's court over eight or ten minutes, and in Windsor but half an hour.

"Q. Where did you get the information which led you to write this article? A. When I came in, Mr. Bains was there talking with the magistrate about these two men. Mr. Bains said there had been a burglary committed, and he thought that these two men were the ones. That is what he was telling Bartlett at the time. Mr. Bartlett was not so sure, but Mr. Bains was telling him the stuff he found on them, and he gave Bains permission to keep them until further developments. I think I arrived there shortly after they had been examined and returned to the cell. That is my impression now.

"Q. Yo didn't see these men in the court-room at any time? A. No, sir.

"Did you hear anybody else talking about it besides Bains

and the magistrate? A. No, sir; I did not. I talked with Bartlett afterwards, and he read the warrant that Mr. Wigle had sworn to; and Mr. Bartlett gave me the information that I got.

"Q. He gave you the information about the Bothwell robbery? A. Yes, sir.

"Q. Did you know about it before? A. No, sir; I hadn't heard about it.

"Q. Will you state whether or not the account was based upon the facts that you learned there? A. Yes, sir.

"Q. Will you state what, if anything, was said in that conversation about their being hard-looking characters? A. Yes, sir. Mr. Bains, I think, said it. He said they were rather hard-looking citizens. The idea that I got from it was, that they were a couple of tramps, such as you see any day on the railroad. That is the impression conveyed to me."

He could not say that either Bains or Bartlett said that two thousand dollars in money had been taken from the Bothwell post-office, but expects they did, because he wrote it that way. Mr. Bartlett said that about thirty dollars of stamps had been stolen at Bothwell. He also told witness that the men (plaintiff and French) were searched at the station, and thirty dollars' worth of stamps found upon them.

"Q. Who told you that they were hard-looking citizens? A. Mr. Bains said it to the magistrate. Nobody told me. There should be quotation marks there.

"Q. Who told you that they canvassed the business part of Windsor? A. The magistrate, also.

"Q. Who told you that they were making an effort to sell the stamps at half-price? A. Mr. Bartlett.

"Q. Where did you get their names? A. I found them on the warrant."

He further testifies that he did not ask any particulars about these men; nobody seemed to know where they came from.

"I asked Mr. Bartlett if he knew who they were, and he said no, he did not.

"Q. Did you ask Mr. Bains? A. No, sir. You can't ask Mr. Bains anything when he is excited.

"Q. Was Bains excited? A. Yes, he was. Whenever Mr. Bains had criminals on hand, I would always go to Mr. Bartlett for information, because he didn't get so flustrated."

This reporter made no further effort to find out who these

men were, or the particulars of the transaction, because, as he says, "there was no use." He testified that Bartlett was not so strong in his opinion that the men were connected with the burglary as Bains; but Bartlett told the reporter that Bains would hold them for developments. On Monday, about three o'clock, P. M., he learned that the men had been released. Before he wrote the last item, he went up to the court-house at Windsor. Bains and Bartlett were inside. Outside of the building he met a patrolman,—didn't know who he was,—and asked him about "the McAllister-French business." He said they were discharged. "I said, 'What was the matter?' and he said, 'No evidence.' I said, 'Don't you know who they were?' and he said, 'No.'"

He claims he went back to the town hall or court-house twice afterwards that day to see Mr. Bains, but he and Bartlett had gone to Sandwich.

"Q. When did you write that item? A. Monday night. It came out Tuesday.

"Q. Did you ever make any effort, up to that time, to find out whether they were reputable citizens or not? A. No, sir. It had slipped my mind."

Mr. Fralick, the city editor, was not sworn, but Mr. Quinby testified that he didn't know that Fralick took any steps to find out about these men. He heard nothing about the matter afterwards.

A. G. Boynton, one of the stockholders of the defendant company, was sworn for the defendant, and testified that he resided on Bagg Street, which runs into Park Street.

"Q. Some allusions were made by counsel in this case, in his opening, to the fact that you lived in the same neighborhood with Mr. McAllister. A. Mr. McAllister lived a neighbor to me for some years."

He testified that he was acquainted with plaintiff in a general way for some years, but never knew Mr. French until he saw him in the court-room. Boynton never heard of the item complained of until it was published.

"Q. Did you read the item before it was published? A. No, sir; I don't remember reading it at all."

It was not an item that came in his department, and he knew nothing of it until told that suit was brought, and then he hunted it up.

This is the substance of the material testimony taken in the case. Mr. Bartlett having returned to Windsor, plaintiff's

counsel asked the court to adjourn the case until the following morning, so that he could be produced for the purpose of contradicting the witness Quinby as to the source of his information. The court declined to allow an adjournment, and exception was taken.

It does not appear from the record at what time of day this motion was made, and therefore we are not entirely satisfied that this refusal was an abuse of discretion; but it seems to us that the adjournment, in the interest of justice, should have been granted. If the witness Quinby was not telling the truth as to his source of information, it was a very material fact to be considered in the case. If the portions of the article acknowledged to be untrue were manufactured by the reporter, they were certainly not privileged. Such fact would also have a bearing upon the question of damages. If, as the reporter says, he did not get to the court-room of the magistrate until after the plaintiff and French had been taken out, the warrant read to them, and they returned to their cells, it is not likely that Bartlett gave the reporter the information he claims he did, if Bartlett's testimony on the trial is true. Mr. Bartlett testified as follows:—

"Q. About what time upon this Saturday did Mr. Wigle make the complaint, and swear to it? A. I think between two and three o'clock.

"Q. Were the accused parties arraigned on that complaint? A. The complaint was read to them, I think.

"Q. What was done when it was read? Were they required to plead to it? A. Mr. Wigle appeared, I think, at the same time that they were there, and the complaint was read to these parties; but Mr. Wigle, by the time we read the complaint, had become convinced that they were innocent, so far as an intentional violation of the law was concerned, and he withdrew the complaint, and I think he withdrew it in the presence of these two parties."

He also testified that no complaint was made against them on account of the Bothwell robbery, and that such robbery was only a matter of conversation between him and the postmaster, and he could not swear that Bains, the chief of police, informed him that he suspected these men of that robbery, but thought it quite probable that he did. Nor could he remember that there was any conversation between himself and Bains in regard to the circumstance of these parties having postage-stamps that they were offering for sale. It would

appear from the record that Mr. Bartlett was sworn for the defense, and had gone back to Windsor before Mr. Quinby was examined. The plaintiff was entitled to his testimony, unless the circumstances were such that it could have been procured that day without adjournment over.

This case clearly ought to have gone to the jury. The item was confessedly untrue in several particulars; and these false items all tended, in the connection used, to carry the impression that plaintiff and French were guilty of a felony: 1. The coincidence, which was not a true one, that about thirty dollars' worth of stamps had been stolen from Bothwell, and the same amount found upon these parties; 2. That they were "hard-looking citizens," carrying the impression, as Quinby admits, that they were a "couple of tramps"; 3. That they canvassed the entire business part of Windsor, in the effort to sell stamps at half-price, which contains two untruths; 4. That they at last tried to sell the stamps to the postmaster.

It requires but a glance to discover a vast difference between the actual facts of this transaction, and the story as published. A true account would have shown the arrest of two reputable American citizens for the offense of selling stamps without a license, discharged by the magistrate of such offense as soon as the complaint was read, because the postmaster was satisfied that they meant no intentional violation of the law, but kept by the chief of police of Windsor for three hours afterwards, and treated by him with gross indignity; that he had suspicions that they were connected with the Bothwell robbery, because of the stamps and gold coin found upon their persons, but he refused to let them communicate with their friends or counsel in Detroit, and did not release them until he was obliged to by the order of the magistrate, although he had learned that they were all right,—in short, an inexcusable outrage by the chief of police upon honest men, guilty of no crime, and innocent of any intentional wrong.

The publication shows a couple of tramps, trying at every business place in Windsor to sell postage-stamps at half-price, having the same amount in their possession that was stolen at Bothwell the week before. At last they try the posmaster, who has them arrested. "Chief Bains will hold them to await developments."

Before or about the time it was handed to the city editor, who, it seems, took no steps to ascertain its truth, these men had been discharged; and, when it was being read by people

on Sunday in the Free Press, French and the plaintiff were at home in Detroit, as free from any restraint of the law, and from any suspicion of wrong-doing, except for this article, as the reporter who wrote it.

If it were not possible, as contended, that a true statement of the whole of the facts could have been published at that time, certainly a little inquiry on Monday afterwards by this same reporter might have set the matter aright. But it was a matter of so small consequence to him that "it had slipped his mind," and he contents himself with the statement of a patrolman on the streets of Windsor, and the paper on Tuesday has an item that French and the plaintiff have been discharged because there was no evidence that they were the men wanted at Bothwell. In other words, it is published, not that they were discharged because their innocence was established, which was the fact, but because the charge or suspicion that they were concerned in the Bothwell robbery was "not proven."

If the reporter had contented himself with stating that these men had been arrested, and a complaint made against them for selling stamps without a license, and that the fact of their offering to sell the stamps, and having them in their possession when searched, led the chief of police to think that they might be connected with the Bothwell robbery, and that Chief Bains was holding them to await developments, it might have been privileged, although not true at the time it was published, and not the whole truth at any time, which the reporter had the means and opportunity to discover, but did not. But, as the case stood, it was not privileged, and the only question for the jury was one of damages.

It will be noticed that the item as published was not in "quotation marks," as the reporter thinks some of it ought to have been. It was printed as a matter of fact coming from Windsor, when in fact it was written by an employee of the paper at Detroit, entirely from hearsay. He could have personally investigated the matter, but did not do so. He did not ask to see the men, or go where they were. He did not talk with the postmaster. He heard, as he says, a talk between Bains and Bartlett, and asked the latter a few questions. The only thing that he saw with his own eyes — the complaint — he does not mention in his publication. If he had stated the nature of it, it might not have carried so great an impression of the parties' guilt. The publication was looking

towards a felony. The complaint he saw was only for a misdemeanor.

Nor was any care shown by the newspaper. It was, as far as the record shows, published as handed in by the reporter, without thought of verification. It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it has heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and wide-spread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise.

The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby.

It is indignity enough for an honest man to be arrested and put in prison for an offense of which he is innocent, and for which indignity ofttimes he has no redress, without being further subjected to the wrong and outrage of a false publication of the circumstance of such arrest and imprisonment, looking towards his guilt, without remedy. And no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law

stands, never be adequately compensated to one who loves his reputation better than money.

What is privileged in publications? The truth is privileged when published from good motives, and for justifiable ends. And that which is not true, but honestly believed to be true, and published in good faith, by one in the performance of a public or official duty, in certain cases, is also privileged.

This is so in the case of communications made to a body or officer having power to redress a grievance complained of, or having cognizance of the subject-matter of the communication, to some intent or purpose, and in cases where the communication is made confidentially, or upon request, where the party requiring the information has an interest in knowing the character of the person inquired after. So may a person be justified where he is honestly endeavoring to vindicate his own interests, as in the case of the slanderer of title, or guarding against any transaction which might operate to his own injury: See *Usher* v. *Severance*, 20 Me. 9, 16; 37 Am. Dec. 33. As is well said by Chief Justice Whitman in that case: "The case at bar is one of a publication addressed to no person or body of men having power to redress a grievance, and it is rather superfluous to add, not a confidential communication to any one, and does not appear to have been designed to guard against any injury imminently threatening the individual interests of the publisher; nor does it present a case of words in themselves not actionable."

The liberty of the press, as the law now stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other person. A newspaper proprietor is not privileged, as such, in the dissemination of the news, but is liable for what he publishes in the same manner as any other individual: Townshend on Slander and Libel, sec. 252.

The judgment of the court below is reversed, and a new trial will be granted, with costs of this court to plaintiff.

Newspaper Libel. — The object of this note is, not to treat of the general law of libel, but rather to state the rules especially applicable to cases wherein complaint is made of libels alleged to have been published in newspapers or other periodicals. We are not aware that the rules or principles

applicable to the publication of libels are in any respect different when their publication is in a newspaper from what they are when such publication is in some other periodical. Therefore, in this note, we shall use the term "periodical" as indicating newspapers as well as other publications made at stated periods, in magazines and other periodicals of more enduring and pretentious character than ordinary newspapers. If in this note any attention is given to principles not exclusively applicable to the publishers of periodicals, it will be found, on examination of the adjudged cases in which these principles have been announced and applied, that by far the greater number of them have been actions or prosecutions against the publishers of periodicals, and that while the principles may occasionally be applied to other publishers, yet that such is so rarely the case that their consideration is amply justified in a note which attempts to treat of the law of newspaper libel.

For the publication of a libel in any periodical, five different classes of persons may be answerable, viz., the author, the editor, the printer, the proprietor, and any other person who engages in the publication or distribution of the libelous periodical with knowledge of the libel therein contained. In other words, all who knowingly participate in or contribute to the libel must respond in damages to the subject thereof, if he is injured thereby.

The proprietor of a periodical in which a libel has been published cannot escape liability otherwise than by proving that it was a matter which, notwithstanding its libelous character, he had the right to publish. In vain may he urge that he knew nothing of its intended publication, that he was absent from the city or other place where his paper was printed, and had left it in charge of others, who in the publication of the libel complained of had not acted in pursuance of his instructions to them: *Hunter* v. *Sharp*, 4 Fost. & F. 983; 15 L. T., N. S., 421; *Rex* v. *Walter*, 3 Esp. 21; *Rex* v. *Dodd*, 2 Ses. Cas. 33; *Andres* v. *Wells*, 7 Johns. 260; 5 Am. Dec. 267. "As respects a publication by writing a libel, not only the publisher, but all who in any wise aid or are concerned in the production of the writing, are liable as publishers. The publication of the writing is the act of all concerned in the production of the writing. Thus if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher. The law denominates them all makers and all publishers: Townshend on Slander and Libel, sec. 115; 2 Starkie on Slander, 225; Bishop's Crim. Law, sec. 931. The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it (*Huff* v. *Bennett*, 4 Sand. 120); for he is liable, even though the publication was made in his absence, and without his knowledge, by an agent to whom he has given express instructions to publish nothing exceptionable, personal, or abusive, which might be brought in by the author of the libel": *Buckley* v. *Knapp*, 48 Mo. 152.

Whenever the proprietor of a periodical leaves it in charge of other persons, he provides them with the means of injuring others by malicious or careless assaults upon their reputation. If he reserves no supervision over them, he practically authorizes them to write and publish whatever they think proper. They stand in his place and represent him; and if they publish a libel, he is as responsible as if it had been done by him personally or under his direct supervision, and whether the wrong resulted from their negligence or from a wanton and reckless purpose to injure the object of it. In such a case, the fact that the proprietor was not present, and did not have any previous knowledge of the libelous publication, does not constitute a sufficient defense, even to a criminal prosecution against him for libel, in the absence of

any statute modifying the rule of the common law upon this subject: *Bruce* v. *Reed*, 104 Pa. St. 408; 49 Am. Rep. 586; *Rex* v. *Gutch*, 1 Moody & M. 433; 22 Eng. Com. L. 353; *Commonwealth* v. *Moryan*, 107 Mass. 199; *Lothrop* v. *Adams*, 133 Id. 471; 43 Am. Rep. 528. Even if those placed in charge of a periodical by its proprietor publish a libel in defiance of his express instructions, he remains answerable therefor in a civil action; but at the present time the fact that the libel was published contrary to his orders would probably, in the absence of any negligence or carelessness on his part, be sufficient to prevent his conviction if prosecuted criminally: *Perret* v. *Times Newspaper*, 25 La. Ann. 170; *Commonwealth* v. *Moryan*, 107 Mass. 199; *Rex* v. *Gutch*, 1 Moody & M. 433; 22 Eng. Com. L. 353; *Dunn* v. *Hale*, 1 Ind. 344.

The author of a libel which has been published in a periodical, while generally answerable therefor equally with the proprietor, is not liable merely because he is its author. In truth, it is only those who either aid in or assent to the publication of a libel who are answerable therefor. However much one may contribute to the libel in other respects, he is not answerable therefor if he can show his innocence of its publication: *Weir* v. *Hoss*, 6 Ala. 881; *Mayne* v. *Fletcher*, 9 Barn. & C. 382. One who composes a libel does not thereby commit any actionable wrong. It is only when his act, assent, or perhaps his carelessness, causes its publication that he commits an actionable wrong and becomes responsible for its consequences. It need not be shown by direct evidence that the author of a libel procured its publication, if it appears that he did that from which his desire for or his assent to the publication may be presumed. If, for instance, he sends manuscript to the publisher of a periodical, and the latter prints either the whole thereof or a part only, the author must be regarded as guilty of the publication, and held responsible accordingly: *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 7 Car. & P. 395; *Bond* v. *Douglas*, 7 Id. 626; *Pierce* v. *Ellis*, 6 I. C. L. R. 55; *Rex* v. *Lovett*, 9 Crim. Law Rep. 462; *Burdett* v. *Abbot*, 5 Dow, 201; 14 East, 1; and one may be regarded as the author of a libel, and answerable for its publication, although he does not himself commit it to writing, as when, being present at a public meeting where libelous charges are made, he calls attention to the representatives of the press there present, and states that the case is a very scandalous one, of which he hopes they will take notice, and that they will give publicity to the matter: *Parkes* v. *Prescott*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 Week. Rep. 773; 20 L. T. 537.

In Illinois, at the trial of a prosecution for libel, it appeared that the defendant made a statement of the facts constituting the alleged libel to a reporter of a newspaper, who, after writing part of an article embodying these facts, communicated them to the editor of the paper, who wrote and published the article which was claimed to be libelous. When the article was set up in type, it was read by the defendant from proof-sheets, who said it was a little rough, but it was true, and let it go. Having been convicted, the defendant insisted that these facts did not justify the finding that he published the article, and, therefore, that he was wrongfully convicted; but the supreme court, in sustaining the conviction, said: "It is a familiar maxim that what a person does by another he does by himself. And we think it applies in its full force in this case. He voluntarily gives the main statements in the article to one of the persons connected with the publication of the paper, who, after writing part of an article embodying the facts thus given him, communicated them to the editor of the paper, who thereupon wrote and published the article read in evidence. After it was in type, the article was read to plaintiff in error from the proof-sheet. He suggested a

correction as to the course the family referred to resided from Streator; said it was a little rough, but it was true, and let it go. That he, in substance, so said to Gale and Babcock, we think so abundantly proved as to require the jury to so find. He knew it was in type, for the purpose of being published in the paper. He must have known it was read to him to get his indorsement of the truth of the statements it contained. He made no protest or objection to its publication, but, on the contrary, said 'let it go,' and it was published as he thus directed. We may reasonably infer that had he previously, or even at that time, directed the editor not to publish the article, as it might not be true, and if not, that it would inflict a grevious wrong on innocent people, it would never have appeared. On the contrary, he volunteered the statements on which the article is based; hears it read after it is written and in type; hearing it read, he says 'let it go,' and it was published as it was thus directed. Although the editor may be equally liable, that does not exonerate the plaintiff in error. He took an active part in its production and publication, and is essentially one of its authors and publishers, and, as such, must be responsible for the injury he has inflicted on society by his reckless, if not wanton and malicious, conduct in this matter. It would have required but little effort to have learned whether the rumor, as he calls it, was true; but he does not pretend to have made any effort. He himself admitted that it was rough, but that did not restrain his action. We have no doubt of the sufficiency of the evidence to sustain the verdict, and, perceiving no error in the record, the judgment of the court below is affirmed": *Clay* v. *People*, 86 Ill. 147.

The liability of the editor of a periodical is, in England, coextensive with that of its proprietor: *Watts* v. *Fraser*, 7 Car. & P. 369; 7 Ad. & E. 223; 1 Moody & R. 449; 1 Jur. 671; *Kelzor* v. *Newcomb*, 1 Fost. & F. 559. In this country, the editor may escape liability by showing that the libel complained of was published without his orders and against his will: *Commonwealth* v. *Kneeland*, Thach. C. C. 346.

The printer of a periodical is also answerable for any libel therein, and he cannot avoid liability upon any grounds which are not equally available to its proprietor: *Rex* v. *Dover*, 8 How. St. Tr. 546; *Watts* v. *Fraser*, 7 Car. & P. 369; 6 Ad. & E. 225; 1 Jur. 671; 1 Moody & R. 449.

Those who distribute periodicals, either gratuitously or through the sale thereof, thereby become publishers of any libel to be found therein, and equally liable with the proprietor, except that they may exonerate themselves by proving that they did not know, nor have any reason to suspect, that such periodicals contained any libelous matter: *Staub* v. *Bentheusen*, 36 La. Ann. 467; *Rex* v. *Matt*, 8 Mod. 123; *Emmens* v. *Pottle*, L. R. 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 Week. Rep. 116; 53 L. T. 803; *Day* v. *Bream*, 2 Moody & R. 54. In the case of the sale of a great or unusual number of the periodical containing the libel, it is obvious that a defense of this character ought not to be sustained; for the unusual sale ought to put the vendor on inquiry for the cause of the exceptional demand, and no one should be permitted to reap unusual profits through the sale of a libel, and then shield himself by proof of his own negligence in closing his eyes to what he was then doing: *Chub* v. *Flannagan*, 6 Car. & P. 431.

Though several persons may be guilty of the publication of a libel, and therefore subject to an action therefor, neither, after satisfying a judgment obtained against him, has any right to contribution from the other. In fact, there does not appear to be any possible case in which one who is guilty of a libel may compel another to share with or indemnify him for the conse-

quences thereof: *Colburn* v. *Patmore*, 1 Cromp. M. & R. 75; 4 Tyrw. 677. An agreement, made in advance of the publication of a libel, to indemnify and save harmless the publisher thereof for any damages which may be recovered of him by the party libeled, is against public policy, and therefore void: *Atkins* v. *Johnson*, 43 Vt. 78; *Arnold* v. *Clifford*, 2 Sum. 238.

The publication of a libel in a periodical may be proved by putting in evidence a copy of such periodical, and showing that it came from defendant's office, and was one of an edition of the same date: *State* v. *Geandell*, 5 Harr. (Del.) 475; *Woodburn* v. *Miller*, Cheves, 194; or by establishing that other copies were sold by the defendant's agent, who received money for them: *Respublica* v. *Davis*, 3 Yeates, 321. A periodical, printed and published in one state, may also be generally circulated in other states, and when this is the case, the same person may be answerable for its publication in both states. Thus one who has written a libel, and caused it to be published in a periodical in Rhode Island, may be convicted of publishing it in an adjoining county of Massachusetts, in which the periodical usually circulated, if it appears that the number containing the libel in question was received and circulated in such county: *Commonwealth* v. *Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Clinton* v. *Croswell*, 2 Caines, 244; 2 Am. Dec. 235. There is no doubt that the circulation of a periodical in any county or state is sufficient to sustain an action or prosecution for its publication in such county or state: *Root* v. *King*, 4 Cow. 403; *Lucan* v. *Cavendish*, 10 Ir. L. T. 537; *Pickney* v. *Collins*, 1 Term Rep. 647; *Commonwealth* v. *Malcom*, 101 Mass. 6.

Malice. — To entitle one of whom a libel has been published in a periodical to recover his actual damages suffered therefrom, he need not offer any evidence to show whether or not its author or publisher was actuated by malicious motives. If the matter published is both libelous and untrue, malice on the part of its publisher is presumed: *Bradstreet* v. *Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Ryan* v. *Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726; *Beehee* v. *Missouri Pacific R'y*, 71 Tex. 424; *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447; *Simmons* v. *Holister*, 13 Minn. 249; *Root* v. *King*, 7 Cow. 613; *Dillard* v. *Collins*, 25 Gratt. 343; *Smart* v. *Blanchard*, 42 N. H. 137; *Eviston* v. *Cramer*, 47 Wis. 659; *Jones* v. *Townsend's Adm'r*, 21 Fla. 431; 58 Am. Rep. 676. With respect to malice in law this presumption is conclusive. And here it is proper to observe that it is unfortunate that the word "malice" has at least two legal meanings, and that it is sometimes difficult to determine in which it is intended to be used by judges and text-writers in discussing the law of libel. In its ordinary signification, malice means actual ill-will; a desire to injure the object of it, or at least a reckless disregard of consequences, and indifference whether injury is inflicted or not. Whether malice in this sense existed, or not, often becomes a material subject of inquiry in actions and prosecutions for libel, because its existence may justify the imposition of exemplary damages, or render the defendant answerable for publications which are privileged when made upon proper occasions and from justifiable motives. But the presence of malice in this sense is never essential to the maintenance of an action for libel where the publication is not privileged. "In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally without just cause or excuse": *King* v. *Patterson*, 49 N. J. L. 417; *Blumhardt* v. *Rohr*, 70 Md. 328. "Malice is the gist of an action for slander. But the term 'malice' has a twofold signification. There is malice in law as well as malice in fact. In the former and legal sense, it signifies a wrongful act intentionally done without any justification or excuse. In the

latter and popular sense, it means ill-will towards a person; in other words, an actual intention to injure or defame him. This distinction runs through the elementary books and the reports of adjudged cases": *Gilmer* v. *Eubank*, 13 Ill. 274. "If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice — malice in fact and malice in law — in actions for slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communication to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff. But in an ordinary action, for libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice": *Bromage* v. *Prosser*, 4 Barn. & C. 247. The absence of malice in fact, therefore, will not relieve the defendant from liability for such injuries as he may have inflicted on the plaintiff by the publication of a libel upon him: *Haire* v. *Wilson*, 9 Barn. & C. 643; 4 Man. & R. 605; *Fisher* v. *Clement*, 10 Barn. & C. 472; 5 Man. & R. 730; *Wenman* v. *Ash*, 13 Com. B. 845; 22 L. J. Com. P. 190; 17 Jur. 579; *Huntley* v. *Ward*, 6 Com. B., N. S., 514; 6 Jur., N. S., 18; 1 Fost. & F. 552; *Clark* v. *Molyneux*, L. R. 3 Q. B. 237; 47 L. J. 230; and even in a criminal prosecution for libel, where the statute permits the defendant to give in evidence in his defense the truth of the matter contained in the publication charged as libelous, if he further satisfactorily shows that the publication was with a good motive, and for justifiable ends, proof that the matter published was libelous still constitutes a *prima facie* case, and the presumption of malice must be rebutted by the defendant: *Commonwealth* v. *Snelling*, 15 Pick. 337; *Commonwealth* v. *Bonner*, 9 Met. 410.

As before suggested, the presumption of malice in law is indisputable when the publication is false, libelous, and not privileged: *Dakota* v. *Taylor*, 1 Dak. 471. The publisher cannot rebut this presumption by proving that he believed the matters constituting the alleged libel to be true, and published it from good motives: *Smart* v. *Blanchard*, 42 N. H. 147; *King* v. *Root*, 4 Wend. 113; 21 Am. Dec. 102; *Usher* v. *Severance*, 20 Me. 9; 37 Am. Dec. 33; *Cass* v. *New Orleans Times*, 27 La. Ann. 214; *Commonwealth* v. *Snelling*, 15 Pick. 337.

There may be circumstances in which a publisher may escape liability by showing that he did not know that the matter published was libelous. It was so held in a case where the defense "was that an alleged libel was a mere fancy sketch or fictitious tale, which had no relation to the plaintiff, and was not intended to apply to him; that the publisher did not know the plaintiff, nor had he heard of any of the facts stated in the alleged libel as applicable to him, and if it was intended by the writer to be so applied, the defendant had no knowledge of such intention": *Smith* v. *Ashley*, 11 Met. 367; 45 Am. Dec. 216; *Dexter* v. *Spear*, 4 Mason, 115. The facts in this case were exceptional, and the principles stated by the court in deciding it are not beyond question. Certainly if the matters published are libelous on their face,

or if there is anything to warn the publisher that he may injure the reputation of some one, or bring him into contempt, the defendant will not be permitted to prove, as a complete defense, that he did not know that the publication was libelous: *Curtis* v. *Mussy*, 6 Gray, 261.

In implying that an act must be done intentionally to be malicious in law, we think the authorities introduce a false element into their definitions of malice as applied to the law of libel, unless they further imply that every one must be conclusively presumed to intend the necessary or probable results of his acts. One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type, or in placing plaintiff's name under a column, headed "first meetings in bankruptcy," instead of that headed "dissolutions of partnership": *Shepherd* v. *Whitaker*, L. R. 10 Com. P. 502; 32 L. T. 402; or in erroneously stating that the plaintiff's name had been stricken from the roll of attorneys, when it was intended to state that he had been suspended only: *Blake* v. *Stevens*, 4 Fost. & F. 232; 11 L. T. 543. Mere errors in printing an item written by the plaintiff in a somewhat illegible hand will not enable him to maintain an action for libel, though the item, as printed, necessarily exposes him to derision, to which derision the item as written by him contributes quite as much as the errors of the printers in deciphering his manuscript: *Sulling* v. *Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166.

Damages. — So much of the law of damages as is peculiar to the law of newspaper libel is almost inseparably connected with the consideration of the question of malice in making the publication complained of. Of course, as in all other cases of libel, the plaintiff, when entitled to recover at all, should be awarded all the damages actually suffered by him. The more extensive the publication of the libel, the greater the injury probably occasioned by it. Therefore, as bearing on the question of the actual damages done to the plaintiff, he may prove the extent of the circulation of the periodical or pamphlet in which it was published: *Gathercole* v. *Miall*, 15 Mees. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337; *Fry* v. *Bennett*, 28 N. Y. 324; *Bigelow* v. *Sprague*, 140 Mass. 425; and the principal case. "If it appears upon the trial that there was no intention in fact to injure the plaintiff, and that all proper precautions were observed in the publication of the article complained of, such facts will not prevent a recovery of such damages, but will reduce the amount thereof to such sums as must inevitably result from the wrong": *Evening News Association* v. *Tryon*, 42 Mich. 549; 36 Am. Rep. 450; *Scripps* v. *Reilly*, 38 Mich. 23. The plaintiff, if the matters published of him are libelous *per se*, need not offer any evidence of special damages, unless he desires thereby to increase the amount of his recovery; for if he has been libeled, the law will presume that he has been injured, and leave the amount of such injury to the determination of the jury: *Boogher* v. *Knapp*, 76 Mo. 457; *Price* v. *Whitely*, 50 Id. 437; *Rep. Pub. Co.* v. *Miner*, 12 Col. 77.

There are various matters which it is said may be proved in mitigation of damages. We do not understand this expression to mean that any of these matters ought to or can deprive plaintiff of his right to recover such damages as he has actually suffered, but rather that they may wholly or partly remove the presumption of malice, which will otherwise be indulged, and will therefore relieve the defendant from the imposition of punitive damages: *Rearick* v. *Wilcox*, 81 Ill. 77; *Shipp* v. *Story*, 68 Ga. 47; *Wazelka* v. *Hettrick*, 93 N. C.

10. Hence it has been held that a defendant may prove, in mitigation of damages, that he received letters purporting to have been written by reputable citizens charging the plaintiff with certain wrongful acts; that these letters were in fact forgeries, and that he, believing them to be genuine, was imposed upon and induced to publish the libel complained of, in the belief that it was true: *Storey* v. *Early*, 86 Ill. 461. If the defendant wishes to give evidence of the truth of the libelous matter, he must plead it in justification; and failing to so plead it, he is not entitled to place in evidence before the jury, in mitigation of damages, matters which ought to have been pleaded in justification. Hence if the defendant's belief in the truth of a libelous publication can be proved in mitigation of damages, it can only be in those cases in which he distinctly disavows all right to urge that the words published were true in fact, and merely seeks to remove the presumption of malice by disclosing "the circumstances which induced him erroneously to make the charge complained of": *Minesinger* v. *Kerr*, 9 Pa. St. 312; *Shilling* v. *Carson*, 27 Md. 175; 92 Am. Dec. 632; *Howard* v. *Thompson*, 21 Wend. 319; 34 Am. Dec. 238; *Petrie* v. *Rose*, 5 Watts & S. 364. In criminal prosecutions for libel, there are cases where, though the truth of the defamatory publication is not a complete defense, it may be given in evidence in mitigation of the offense: *Commonwealth* v. *Morris*, 1 Va. Cas. 175; 5 Am. Dec. 515; *Commonwealth* v. *Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Commonwealth* v. *Clap*, 4 Mass. 163; 3 Am. Dec. 212. The gross negligence of the defendant may be shown for the purpose of enhancing damages: *Smith* v. *Harrison*, 1 Fost. & F. 565; *Scripps* v. *Reilly*, 35 Mich. 272. On the other hand, evidence is admissible to rebut any imputation of negligence which might otherwise exist, and the proprietor of a periodical is therefore entitled to show the circumstances attending its publication, the necessity of prompt action on his part, the haste incident to issuing the paper, the time at which the libelous article was handed in, and the sufficiency of the force employed on the paper for gathering news and preparing and supervising articles for publication: *Scripps* v. *Reilly*, 38 Mich. 10. It is not proper, however, to instruct the jury that they may consider in mitigation of damages the excitement attending a pending election at which the plaintiff was a candidate, and that the alleged libel was published for the purpose of assisting in his defeat: *Rearick* v. *Wilcox*, 81 Ill. 77.

While the retraction of a libel does not relieve its publisher from liability for its publication, it may be proved in mitigation of damages: *Cass* v. *New Orleans Times*, 27 La. Ann. 214. One insult does not justify another, nor has the subject of a libel unbounded liberty to indulge in libels upon his adversary. Nevertheless, a libelous retort to a recently published libel is viewed with great charity. If it is in the nature of a reply to the previous libel, and in refutation of its charges, accompanied with disparaging remarks on the libeler not entirely irrelevant to the subject under consideration, the previous libel will be in many instances received in evidence in justification, and in all cases is admissible in mitigation of damages: *Chaffin* v. *Lynch*, 83 Va. 106; *Myers* v. *Kaichen*, 75 Mich. 272; *Stewart* v. *Minneapolis Tribune Co.*, 41 Minn. 71. The publisher may also prove in mitigation of damages that in publishing the article complained of he acted from an honest motive to protect the public against impostors, and upon information tending to show that the person defamed by the publication was engaged in a corrupt scheme to obtain and appropriate money for his own profit: *Mosier* v. *Stall*, 119 Ind. 244; *Hunter* v. *Sharpe*, 4 Fost. & F. 983; 15 L. T., N. S., 421.

The general rule controlling the reception of evidence in mitigation of damages is, that any circumstances may be proved "which tend to disprove

malice, but do not prove the truth of the charge": *Storey* v. *Early*, 86 Ill. 461; Newell on Defamation, 882. Evidence may therefore be admitted to show what were the motives of the defendant in making the publication. *Heilman* v. *Shanklin*, 60 Ind. 441. There is one class of evidence admissible in mitigation which appears to establish rather than to disprove actual malice. We refer to evidence of the existence of circumstances connected with the libelous charge, and showing any provocation therefor received from the plaintiff: *Knott* v. *Burwell*, 96 N. C. 279; *May* v. *Brown*, 3 Barn. & C. 113; 10 Eng. Com. L. 24.

Exemplary damages, in the absence of statutes denying them, may always be awarded if it appears that the defamatory publication proceeded from express malice or ill-will: *Snyder* v. *Fulton*, 34 Md. 128; and various circumstances may be received in evidence as tending to establish the existence of malice in fact. Among these are, that other libelous publications have been made by the same defendant against the same plaintiff: *State* v. *Riggs*, 39 Conn. 493; *Larrabee* v. *Minneapolis Tribune Co.*, 36 Minn. 141; *Behee* v. *Railway*, 71 Tex. 424; though made at so remote a period that any action to recover damages therefor is barred by the statute of limitations: *Evening Journal Association* v. *McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; or a refusal to retract a libel, or to publish, except as an advertisement to be paid for by the plaintiff, any card or statement expressing belief in his innocence: *Klewin* v. *Bauman*, 53 Wis. 244; *Barnes* v. *Campbell*, 60 N. H. 27.

If a periodical is owned or published by two or more partners, malice in fact of any one of them in making a libelous publication entitles the plaintiff to recover against all, as if all had participated in such malice: *Lothrop* v. *Adams*, 133 Mass. 471; 43 Am. Rep. 528. We find it difficult to reconcile the decisions concerning the liability for libels attributable to the malice of editors, reporters, and other employees, in which the proprietors of the periodical in which the publication was made did not participate. It is undoubtedly true that a proprietor who places another person in charge of a periodical becomes answerable for whatever he may publish, "whether the wrong resulted from mere negligence, or from a wanton and malicious purpose to accomplish the business in an unlawful manner"; and, perhaps, in many states, a proprietor in whose periodical a libel is published through the malice or ill-will of an editor, reporter, or other employee is liable to the same extent as if the malice had been entertained, and the publication authorized by the proprietor himself: *Bruce* v. *Reed*, 104 Pa. St. 408; 49 Am. Rep. 586. Probably, however, the weight of authority at the present time is in favor of exonerating a proprietor from exemplary damages if the publication is due to the malice of his employees, and is made without his previous knowledge or consent, and under circumstances which relieve him from the charge of negligence in permitting such publication: *Steviston* v. *Cramer*, 57 Wis. 570; *Detroit Post Co.* v. *McArthur*, 16 Mich. 447; *Scripps* v. *Reilly*, 38 Id. 10; *Robertson* v. *Wylde*, 2 Moody & R. 101.

In a few of the states exemplary damages are not allowed in actions for slander or libel: *Rep. Pub. Co.* v. *Miner*, 12 Col. 77; *Rosewater* v. *Hoffman*, 24 Neb. 222; but in a greater number they may be awarded in all cases where the jury is satisfied, from the evidence, that the defamatory publication was actuated by malice or ill-will towards the defendant: *Templeton* v. *Graves*, 59 Wis. 95; *Klewin* v. *Bauman*, 54 Id. 244; *Montgomery* v. *Knox*, 23 Fla. 595; and this malice or ill-will may be inferred from the fact that the defendant has published defamatory matter of the plaintiff which falsely charges

him with an indictable offense, or which is otherwise libelous *per se:* *Bergmann* v. *Jones*, 94 N. Y. 51.

The plaintiff's reputation may, previously to the publication of the libel of which he complains, have been bad, in which case the publication can do him little or no harm. The defendant is entitled to prove this fact in mitigation of damages. The evidence upon this subject, to be admissible, must not be in regard to plaintiffs having in fact committed specific acts or crimes, but must be restricted to the plaintiff's general reputation: *Warner* v. *Lockerly*, 31 Minn. 421; *Stone* v. *Varney*, 7 Met. 86; 39 Am. Dec. 762; *Byrket* v. *Monohon*, 7 Blackf. 83; 41 Am. Dec. 212; *Clark* v. *Brown*, 116 Mass. 504; *Mahoney* v. *Belford*, 132 Id. 393; *Young* v. *Bennett*, 4 Scam. 43; or his reputation of having committed the particular act with which he is charged in the publication complained of: *Wetherbee* v. *Marsh*, 20 N. H. 561; 51 Am. Dec. 244. "The authorities are numerous to prove that the defendant is not confined to evidence of character founded upon matters of the same nature as were specified in the charges, as, for instance, to evidence of the plaintiff's character as a thief, whereas in this case the charge was theft; but he may give in evidence the general bad character of the plaintiff, not by way of justification, but in mitigation of damages, and for this inquiry the plaintiff must stand prepared": *Lamos* v. *Snell*, 6 N. H. 415; 25 Am. Dec. 468. That it had been generally reported and believed that plaintiff was guilty of the offense charged against him may in some of the states be proved as tending to establish that his reputation had, before the publication complained of, been so depreciated that the libel could not have injured him to the same extent as if he had been of good and unquestionable repute in the neighborhood wherein he lived, or where the publication was made: *Nelson* v. *Evens*, 1 Dev. 9; *Calloway* v. *Middleton*, 2 A. K. Marsh. 372; 12 Am. Dec. 499; *Wetherbee* v. *Marsh*, 20 N. H. 561; 15 Am. Dec. 244; *Sanders* v. *Johnson*, 6 Blackf. 50; 36 Am. Dec. 564.

There is no doubt that no one has any right to repeat a pre-existing but false defamatory rumor or statement, and the fact that a slander or libel is but a repetition of one previously existing never justifies it, and will not be received in evidence as a complete defense: *Watkins* v. *Hall*, 9 Best & S. 279; L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 Week. Rep. 857; 18 L. T., N. S., 561; *Hotchkins* v. *Oliphant*, 2 Hill, 410; although the last publisher discloses the name of some previous author or publisher at the time he makes the publication complained of: *McPherson* v. *Daniel*, 10 Barn. & C. 263; 5 Man & R. 251; *Tidman* v. *Anslie*, 10 Ex. 63.

If a defamatory charge is published without any reference being made to its author or previous publisher, the last publisher, when an action is brought against him therefor, cannot show, even in mitigation of damages, that he merely repeated what had already been published by another: *Treat* v. *Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Inman* v. *Foster*, 8 Wend. 602; *Peterson* v. *Morgan*, 116 Mass. 350; *Bradley* v. *Gibson*, 9 Ala. 406; *Talbot* v. *Clark*, 2 Moody & R. 312; *Shehan* v. *Collins*, 20 Ill. 325; 71 Am. Dec. 271; *Davis* v. *Sladden*, 17 Or. 259; *Marker* v. *Dunn*, 68 Iowa, 720. The defendant may, however, prove, in mitigation of damages, that the charge had been previously published, if, at the time of its republication, he either gave the name of the author or the person from whom he had heard it, or disclosed in some other appropriate manner that he did not make the charge himself, but merely repeated what he had heard or had seen in some other publication: *McDonald* v. *Woodruff*, 2 Dill. 244; *Bennett* v. *Bennett*, 6 Car. & P. 586; *Evans* v. *Smith*, 3 Mon. 363; *Dunscombe* v. *Danville*, 8 Car. & P. 222; 2 Jur.

32; *Storey* v. *Early*, 86 Ill. 461; *Galloway* v. *Courtney*, 10 Rich. 414; *Young* v. *Simons*, Wright, 124; *Williams* v. *Greenwade*, 3 Dana, 438. In Minnesota, and perhaps in a few other states, the defendant, for the purpose of establishing his belief of charges published by him, and of relieving himself from the imputation of malice in fact, may prove, in mitigation of damages, that he had seen the same charges in another periodical before he published them himself: *Hewitt* v. *Pioneer Press Co.*, 23 Minn. 178.

Newspapers exist in response to a demand of the public for news, or for information upon divers subjects, both public and private. When one who publishes a libel acts in the *bona fide* discharge of a public or private duty, legal or moral, he is exonerated from liability, unless it appears that he acted with a malicious intent: *White* v. *Nichols*, 3 How. 286. There are provisions in the constitution of many of the states guaranteeing the liberty of the press, and there is an unquestionable demand for news upon all sorts of topics, and especially for statements concerning the character, reputation, and supposed evil doings of those who are personally known in the community, or whose prominence is such as to excite interest in them even beyond localities in which they are personally known. Because of these provisions guaranteeing the liberty of the press, and of the wide-spread demand for all kinds of news, it has been claimed on behalf of publishers of periodicals that they have the right to publish whatever they may, in good faith, regard as news, and as supplying a well-known demand, provided that, in what they publish, they do not act malevolently, nor otherwise than merely in response to the desire of the public for information respecting the matters published. From the fact that there is a demand for news, they argue a duty on their part to supply such demand, and, as a necessary consequence, that they can not be held answerable for performing this duty as long as they do not act maliciously, even though it should happen that the statements published were not true, and were calculated to imperil or destroy the reputation and happiness of the persons against whom they were made.

If the duty of the proprietor of a periodical is to be measured by the demand for what he publishes, then the more libelous his publications the more imperative his duty to publish them, for, doubtless, the demand for defamatory news is more eager and inexhaustible than for any other. The existence of this duty cannot be conceded, except to a very limited extent. In considering whether it may be conceded at all, and if so, under what circumstances, or in what cases, publications may profitably be divided as follows: 1. Those relating to private persons, acting in their private capacity; 2. Those relating to persons either filling or seeking public offices or stations, or to the criticism of works to which they have expressly or impliedly invited public attention; 3. Those relating to acts done or proceedings taking place in some public office or department, — legislative, executive, or judicial.

The liberty of the press, which is guaranteed under the constitution of many states, does not confer upon it any greater right to publish, through periodicals, than is given by those other clauses of the same constitutions guaranteeing liberty of speech, — to publish through the vocal organs. In either case, the publisher is subject to the laws of the land; his publication must not be criminal, nor one in defiance of the penal laws; and, at least, when false and defamatory, he must answer in damages to any one defamed or injured thereby: *Davidson* v. *Duncan*, 7 El. & B. 229; 26 L. J. Q. B. 104; *Palmer* v. *Concord*, 48 N. H. 211; 97 Am. Dec. 605; *Barnes* v. *Campbell*, 59 N. H. 185; 47 Am. Rep. 183.

A leading case upon this subject is that of *Sheckell* v. *Jackson*, 10 Cush. 25.

The defendants had published a libel of the plaintiff, charging him with treachery and bad faith in regard to money received by him to obtain manumission of a fugitive slave, and with then inviting the slave to go into a slave district with a view of again placing him in a state of slavery. The defendants sought to prove that there was a general anxiety in the community lest the slave in question had been deceived in transactions with the plaintiff, and reduced to slavery; and they claimed that, as publishers of a periodical, they had a duty to perform, and that they stated what they honestly thought to be true. The trial court, among other instructions, gave the jury the following: "But in point of law, the occasion of this publication was not such a one as affords a justification to the defendants for publishing what was not true. The defendants' case does not come within the privileged or excepted cases from the general rule. But if the publication is libelous upon the plaintiff, upon the definition of libel as before given to you, then the defendants are by law responsible to the plaintiff in damages for the injury they have done him. Then it has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods, to the injury of others." These instructions, when assailed in the appellate court, were pronounced correct in point of law, and well adapted and applied to the circumstances of the case.

"The terms 'freedom of the press' and 'liberty of the press' have misled some to suppose that the proprietors of a newspaper had a right to publish that with impunity for the publication of which others would have been held responsible. But the proper signification of these phrases is, if so understood, misapprehended. The 'liberty of the press' consists in a right in the conductor of a newspaper to print whatever he chooses, without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible for the publication": *Sweeney* v. *Baker*, 13 W. Va. 158; 31 Am. Rep. 757.

"Freedom of the press and freedom of speech are equally sacred and equally protected by the constitution. Section 3 of the Bill of Rights provides that 'the liberty of the press shall forever remain inviolate, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such rights.' In this country, almost all officers are elective. The press does not possess any immunity not shared by every individual. In every election the same freedom of discussion of the merits and demerits of candidates is allowed equally to press and people, and every citizen can claim to be interested in the choice of his rulers. Now, can it be said that every household visitation made by itinerant politicians, poisoning the minds of electors with libelous and slanderous charges against candidates, every public harangue filled with similar matter, every club-room discussion in which such charges are bandied about with licentious freedom and exaggeration, are privileged communications, and imposing upon the injured party the necessity of proving that they were uttered and published with express malice? We have never supposed that the freedom of speech, even in this country, could legally be carried to such an extent. Yet, if such is the law as to an article published in a public journal, there can be no good reason shown why it does not extend to all channels of communication between man and man during the pendency of an election. We think a public

journal or an individual who indulges in defamatory assertions about candidates for office is equally liable for his acts with those who commit the same offense against private individuals": *Aldrich* v. *Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84.

So far as our researches have extended, we have been unable to discover any case wherein a periodical has falsely charged a person acting in his private capacity with the commission of a crime in which the proprietor of the periodical has been permitted to justify his act on the ground that the publication was privileged, because made in good faith as an item of news. "The right to publish through the newspaper press such matters of interest as may thus be properly laid before the public does not go to the extent of allowing publications concerning a person of false and defamatory matter, there being no other reason of justification for doing so than merely publishing the news": *Mallory* v. *Pioneer Pub. Co.*, 34 Minn. 521; *Usher* v. *Severance*, 20 Me. 9; 37 Am. Dec. 33. "The law favors the freedom of the press so long as it does not interfere with private reputation, or other rights entitled to protection. And inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to public scrutiny. And since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns, to the lowest degree which reasonable foresight can assure": *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 452.

In the case of *Barnes* v. *Campbell*, 59 N. H. 128, 47 Am. Rep. 183, the defendants, who had charged plaintiff with the commission of a crime, pleaded that they were the publishers of a newspaper, and, as such, that it was their duty to give to their readers such items of news as they might judge to be of interest and value to the community, and that, as such publishers, they published the article complained of in good faith, without malice, and believing, and having good reason to believe, the same to be true. In determining that this plea was insufficient, and ought to be stricken out, the appellate court said: "The defendants probably intended to set out the excuse of a lawful occasion, good faith, proper purpose, and belief, and probable cause to believe, that the publication was true. They laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt as a privileged class from the consequences of damage done by their false news. Their communications are not privileged merely because made in a public journal. They have the same right to give information that others have, and no more. The occasion of the defendants' publishing a false charge of crime against the plaintiff was not lawful, if the end to be attained was not to give useful information to the community of a fact of which the community had a right to be, and ought to be, informed, in order that they might act upon such information: *State* v. *Burnham*, 9 N. H. 34, 41, 42; 31 Am. Dec. 217; *Palmer* v. *Concord*, 48 N. H. 211, 217; 97 Am. Dec. 605; *Carpenter* v. *Bailey*, 53 N. H. 590; 56 Id. 283. The defendants do not state facts that would constitute a lawful occasion. They make a loose averment of their general duty to give their readers such news as they (the defendants) might properly judge to be of interest and value to the community. This should be struck out of the

record as insufficient and misleading. It is, in effect, an intimation that they published the libel in the usual course of their business, and is calculated to give the jury the erroneous impression that the defendants' judgment of the propriety of the publication is evidence of the lawfulness of the occasion. The defendants' general business of publishing interesting and valuable news was not, of itself, a lawful occasion for publishing this particular false and criminal charge against the plaintiff. It will be for the jury to say what weight the defendants' business has as evidence on the question of malice. But however high the defendants' vocation, and however interesting and valuable the truth which they undertake to give their readers, their ordinary and habitual calling is no excuse for assailing the plaintiff's character with this false charge of crime. They must show specific facts, constituting a lawful occasion in this particular instance, as if this false charge had been the only thing they ever published."

While the decisions to which we have referred have generally related to libels charging plaintiff with grievous crimes punishable as felonies, the same principles must prevail where the libel in question is less serious in character: *Snyder* v. *Fulton*, 34 Md. 128. Thus a periodical reflecting upon the integrity of a professional man, and charging him with treachery to the interests committed to his protection, cannot be justified because published as an item of news; nor, if he be a lawyer, can the publication be justified on the ground that it related to his conduct of a proceeding in court; for, in those cases in which publication may be made of proceedings in court, the publication must be confined to what actually took place, and not accompanied by libelous animadversions on the participants: *Atkinson* v. *Detroit Free Press Co.*, 45 Mich. 341; *Ludwig* v. *Cramer*, 53 Wis. 193.

Various statutes have been enacted in different portions of the United States for the purpose of modifying the law of libel with a view of enlarging the circumstances under which newspapers may either wholly escape liability, or may diminish the damages otherwise recoverable. Thus in Connecticut, in the year 1855, it was enacted "that in every action for an alleged libel the defendant may give proof of intention; and unless the plaintiff shows proof of malice in fact, he shall recover nothing but the actual damages proved and especially alleged in the declaration." In construing this statute it was held that a belief that the charge is true is not a defense sufficient to excuse the party making the publication, where the circumstances were such as to show an indifference to its truth or falsity: *Moore* v. *Stevenson*, 27 Conn. 14. It was also held that this statute permitting the defendant to give evidence of his intention was but an extension of a rule previously existing as to the admissibility of evidence; that such evidence had always been admissible in reduction of damages, but that the statute made it, in the absence of rebutting proof on the part of the plaintiff, a bar to the recovery of general damages; that the provision that the plaintiff shall prove malice in fact was not intended to prescribe any new rule as to the kind and degree of malice to be proved, or as to the evidence by which the existence in fact of improper motives was to be shown, but only to require that it be shown by other evidence than mere legal presumption from the fact of publication that the defendant's motives were not proper and justifiable; that the motives of defendant were improper may still be inferred from the character of the publication itself and from the attendant circumstances, and that it was not necessary for the plaintiff to prove any actual hostile motives; and finally, that any construction of the act which would make it abridge beyond these limits the rights of plaintiff in such a suit would bring it into conflict with that portion of the constitu-

tion of the state declaring that "every person for an injury done him in his person, property, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay": *Hotchkiss* v. *Porter*, 30 Conn. 414. By the Michigan statute of 1885 it was enacted "that in any suit brought for the publication of a libel in any newspaper, the plaintiff shall only recover actual damages, if it shall appear that the publication was made in good faith and did not involve a criminal charge, and its falsity was due to mistake or misapprehension of the facts; and that in the next regular issue of said newspaper after such mistake or misapprehension was brought to the knowledge of the publisher or publishers, whether before or after suit was brought, a correction was published in as conspicuous a manner and place in said newspaper as was the article sued on as libelous"; and the statute further declared that the words "'actual damages' should be construed to include all damages the plaintiff may show he has suffered in respect to his property, trade, profession, or occupation, and no other damages." In the case of *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep., the opinion was expressed that this statute was not "within the power of constitutional legislation." This portion of the opinion was, however, not necessary to the decision of the case. A similar statute having been adopted in Minnesota, its constitutionality was sustained by the supreme court of that state in *Allen* v. *Pioneer Press Co.*, 40 Minn. 117; 30 Alb. L. J. 294; 12 Am. St. Rep. 707. In this case it was further determined that mere belief in the truth of the publication is not sufficient to constitute good faith on the part of the publisher; that he must be free from negligence as well as from improper motives in making the publication; and that it is his duty, notwithstanding the statute, to take all reasonable precautions to verify the truth of the statement and prevent any untrue and injurious publication against others.

The head-line of an article or paragraph, being so conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, may in itself inflict very serious injury upon a person, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. There is no doubt that in publications concerning private persons, as well as in all other publications which are claimed to be libelous, the head-lines directing attention to the publication may be considered as a part of it, and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so: *Lewis* v. *Clement*, 2 Barn. & Adol. 702; *Clement* v. *Lewis*, 7 Moore, 200; 3 Brod. & B. 279; *Harvey* v. *French*, 2 Tyrw. 585; 1 Car. & M. 11; 2 Moore & S. 519; *Hayes* v. *Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874.

We have heretofore shown that the publication of a libel cannot be justified on the ground that it is a mere repetition of what had already been said or otherwise published by some other person or periodical. The fact that a former publication took place at a public meeting and was a part of the proceedings of such meeting, or of a speech there delivered, or a report there made or filed, does not render the rule inapplicable, unless the meeting is that of some official body whose proceedings may be rightfully published within the limits to be hereafter stated. The fact that defamatory words are spoken or written to or by an assemblage of persons does not entitle a proprietor of a periodical to republish them: *Davison* v. *Duncan*, 7 El. & B. 229; 3 Jur., N. S., 615; 26 L. J. Q. B. 104; *Popham* v. *Pickburn*, 7 Hurl. & N. 891; 8 Jur., N. S., 179; 31 L. J. 133; 10 U. K. 324; 5 L. T., N. S., 846; *Hearne* v. *Stowell*,

12 Ad. & E. 719; 4 Perry & D. 696; 6 Jur. 456; and if the republication is incited by any of the participants in such meetings, they are answerable therefor: *Parks* v. *Prescott*, L. R. 4 Ex. 169; 38 L. J. Ex. 105; 17 Week. Rep. 773; 20 L. T., N. S., 537.

While, ordinarily, a periodical cannot justify a libelous publication on the ground that it had a duty to the public, or some portion of it, to make the publication in question as an item of news, a periodical may exist for the special purpose of keeping a particular body or class of men informed on a special subject, and where this is so, it may perhaps justify a republication of libelous matter as falling within the duty which it has voluntarily assumed to its patrons. The least questionable instances of this class of periodicals is to be found in professional and religious journals, which undertake to keep the members of a profession, church, or association informed with respect to the conduct or standing of their fellow-members, and of other matters of especial interest to the common members of such church, profession, or association. If charges have been preferred against a church member, and have resulted in his trial and excommunication by the proper authorities, his sentence may afterwards be read in the church of which he was a member, in the presence of his fellow-members and others who may happen to be there present, without subjecting his pastor, who reads it, to an action for libel: *Farnsworth* v. *Storrs*, 5 Cush. 412. On the same principle, if a charge is made against a minister to an association of ministers of the same church, and is followed by the adoption by them of a resolution declaring their belief in the truth of such charges, and notifying the subject of it to appear and show cause why he should not be dismissed, the publication of this resolution in those periodicals recognized as denominational organs is privileged: *Shurtleff* v. *Stevens*, 51 Vt. 501; 31 Am. Rep. 698. A medical journal may also publish the proceedings of a medical society, when such society is a public corporation authorized by law, though the proceedings include charges made against a member of the association resulting in his expulsion: *Barrows* v. *Bell*, 7 Gray, 301; 66 Am. Dec. 479.

The decisions upon the topic which we are now considering are infrequent, and are hardly sufficient to definitely settle the law controlling it. Possibly they may all be explained and supported upon the ground that the proceedings republished took place before *quasi* judicial tribunals to the jurisdiction of which the parties claiming to have been libeled were subject, and that the publications were justifiable as fair reports of what took place before such tribunals.

If it were possible for one to voluntarily assume the duty of giving information by written or printed publications to a special class of patrons, and to defend whatever he might thus do, in good faith and without malice, as privileged, then the protection of the rule should be extended to the proprietors of commercial agencies, who undertake to obtain information of the standing of persons engaged in trade, and to give their patrons the benefit of such information by circulars or other printed or written means of communication. But while it is lawful to collect such information, and to impart to any patron who may especially apply therefor whatever has been learned concerning the business repute or affairs of any one in whose affairs such patron has any interest (*Ormsby* v. *Douglass*, 37 N. Y. 477; *State* v. *Lonsdale*, 48 Wis. 348; *Trussell* v. *Scarlett*, 18 Fed. Rep. 214; *Sock* v. *Bradstreet*, 22 Id. 771), yet general publications purporting to disclose the business standing or acts of men, and which are circulated among all the patrons of the publisher, and may therefore reach persons who may not have any special interest in the business

or affairs of the person of whom the statements are made, are not privileged, and if false and defamatory, are actionable. This rule has been applied with but little judicial dissent in actions for libel, brought against the Bradstreet and other well-known commercial agencies: *Sunderlin* v. *Bradstreet*, 46 N. Y. 188; 7 Am. Dec. 322; *Taylor* v. *Church*, 8 N. Y. 452; *Bradstreet Co.* v. *Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Ever* v. *Dun*, 12 Fed. Rep. 526; *King* v. *Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622; *Johnson* v. *Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77.

The freedom with which libelous statements are made against, and dishonest and corrupt motives attributed to, public officers in periodicals of high standing and wide circulation tends to produce a popular impression that such officials are not protected by the law against libel. If this impression is to any extent correct, the fault is in the administration of the law, and not in the law itself. The law, instead of abandoning its agents and administrators, seeks to give them special protection; and pronounces as libelous publications of persons in their official capacities which might be regarded as innocent if they were private citizens only. Words spoken of a person to disparage him in an office of public trust, and which directly tend to prejudice him therein, are actionable, without any proof of special damages: *Bellamy* v. *Burch*, 16 Mees. & W. 590; *Tillotson* v. *Cheetham*, 3 Johns. 56; 3 Am. Dec. 459.

It is true that "it is the duty of all who witness any misconduct on the part of a magistrate, or any public officer, to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bona fide* and forwarded to the proper authorities, are privileged. It is not necessary that the informant or memorialist should be in any way personally aggrieved or injured; for all persons have an interest in the pure administration of justice, and the efficiency of our public affairs in all departments of state": Odgers on Libel and Slander, 225; *Harrison* v. *Bush*, 5 El. & B. 344; 25 L. J. Q. B. 25, 99; *Lake* v. *King*, 1 Sev. 240; 1 Saund. 131; 1 Mod. 58; *McIntyre* v. *McBean*, 13 U. C. Q. B. 534. Such charges, to be privileged, must always be made in good faith and to some person, officer, or tribunal authorized to consider them; and must not be spread broadcast over the land. The press has no more privilege to libel public officials than it has to libel private citizens. It owes no duty to the public which justifies it in making false and defamatory charges against public officials. "One may in good faith publish a truth concerning a public officer, but if he states that which is false and aspersive, he is liable therefor, however good his motive." The acts of officers may be criticised; they may even be exposed to ridicule and sarcasm without subjecting the publisher to liability for libel. It is otherwise with respect to the private characters and motives of officers. Aspersions upon them are at the peril of the publisher. He may escape this peril by showing that they were true. The public has an interest in knowing the truth about its officials, but has not any such interest in knowing falsehoods regarding them. The publisher of a libel upon a public official can justify his publication only by proving that it was true: *Hamilton* v. *Eno*, 81 N. Y. 116; *Parmeter* v. *Coupland*, 6 Mees. & W. 105; 4 Jur. 701; *Wilson* v. *Reed*, 2 Fost. & F. 149; *Russell* v. *Anthony*, 21 Kan. 450; 30 Am. Rep. 436; *Bourreseau* v. *Detroit etc. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320; *Nebb* v. *Hope*, 111 Pa. St. 145; *Campbell* v. *Spottiswoode*, 3 Best & S. 769; 9 Jur., N. S., 1069; 32 L. J. Q. B. 185; 11 Week. Rep. 569; *Rowand* v. *De Camp*, 96 Pa. St. 493.

The following publications regarding public officials have therefore been

adjudged not to be privileged, and to be actionable, unless shown to be true: A statement that an award made by a public officer recommending a certain street pavement had been dictated by those interested in such pavement, and made in consideration of a reward given such officer: *Hamilton* v. *Eno*, 81 N.Y. 116; a charge that a member of the legislature had been bribed, or had voted for or against any particular measure from corrupt and dishonest motives: *Cramer* v. *Riggs*, 17 Wend. 209; *Wilson* v. *Nunan*, 23 Wis. 105; *Negley* v. *Farrow*, 60 Md. 158; that the plaintiff, who was a member of Congress, was a fawning sycophant, and misrepresentative in Congress, and a groveling office-seeker, and had abandoned his post in Congress in pursuit of office: *Thomas* v. *Croswell*, 7 Johns. 264; 5 Am. Dec. 269; that plaintiff had openly avowed the opinion that government had no more right to provide by law for the support of the worship of a Supreme Being than for the worship of the Devil: *Stow* v. *Converse*, 3 Conn. 325; 8 Am. Dec. 189; that plaintiff lacked capacity as a judge, had abandoned the principles of truth, and bartered away the office of clerk of his court in such manner as to cancel some of his private debts: *Robbins* v. *Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152; that it was expected that the plaintiff, as court commissioner, would discharge all persons who might be committed by the legislature for refusing to testify, merely to subserve the views of other parties, whose tools and toadies the plaintiff was, and that whatever he might do in the future, the past would warrant the depriving him of his office: *Lansing* v. *Carpenter*, 9 Wis. 540; 76 Am. Dec. 281; that the plaintiff was "a damned-fool justice": *Spiering* v. *Andrae*, 45 Wis. 330; that the plaintiff, subscribing himself chairman of the Democratic county committee, appeared in a card for a ring, by which he was paid a fee, and the publication of which was paid for out of the corruption fund of the ring; that he had descended from the high calling of a clergyman to the recognized champion and professional defender of prostitutes, and the lowest grade of criminals who throng the audience halls of police courts, and seems to follow his profession solely for the purpose of making money, and his opinions are molded by the extent of his client's means to pay: *Barr* v. *Moore*, 87 Pa. St. 385; 30 Am. Rep. 367; that a city physician has caused the death of a child by reckless treatment: *Foster* v. *Scripps*, 39 Mich. 376; 33 Am. Rep. 403; that the plaintiff, as representative in Congress, had, for the purpose of obtaining votes, intentionally pressed for the payment of public money on claims the validity of which was questionable: *State* v. *Schmitt*, 49 N. J. L. 579; that plaintiff, while holding the office of sealer of weights and measures, had made a practice of tampering with the weights and scales in order to swell the fees of his office: *Eviston* v. *Cramer*, 57 Wis. 570; that the plaintiffs, who were officers of the state penitentiary, had been grossly derelict in their duty, and in the management of the prison: *Banner Pub. Co.* v. *State*, 16 Lea, 176; 57 Am. Rep. 214; that the plaintiff was a "retail liquor dealer, and, we are informed, is under indictment for not canceling the stamps on liquor-casks, the contents of which he has sold": *Jones* v. *Townsend's Adm'r*, 21 Fla. 431; 58 Am. Rep. 676; that a county superintendent of schools, for a consideration in money, had induced the county board of education to order a change in school-books: *Hartford* v. *State*, 96 Ind. 461; that a school-teacher had punished a pupil so excessively as to cause its death: *Doan* v. *Kelley*, 121 Id. 413.

While the motives and private characters of public officials cannot be assailed in periodicals without subjecting their proprietors to actions for libel, in which they must assume the burden of establishing the truth of their defamatory assertions, criticism of all official acts may be safely indulged, and the language employed may be caustic and irritable in the extreme. A peri-

odical may comment on the conduct of a magistrate in dismissing a case without hearing the whole evidence, or in committing a prisoner for trial on insufficient evidence, if the motives of the magistrate in so doing are not questioned: *Hibbins* v. *Lee*, 4 Fost. & F. 245; 11 L. T. 541. Comment may also be made on the management of the poor, and the administration of the poor-law: *Purcell* v. *Sowler*, L. R. 2 C. P. D. 218; L. R. 46 C. P. D. 308; 25 Week. Rep. 362; on the official conduct of way-wardens: *Harle* v. *Catherall*, 14 L. T. 801; and on that of all other officials in the discharge of the duties devolving upon them as such.

Doubtless it is impossible to prescribe the precise limits to which the criticism of official action or inaction may extend without becoming unlawful, and therefore actionable. But few attempts have been made to describe these limits. One of these may be found in the opinion of the court in *Palmer* v. *City of Concord*, 48 N. H. 211; 97 Am. Dec. 605. Palmer brought an action against the city to recover damages for property destroyed by a mob. The statute under which the action was authorized declared that no recovery could be had thereunder in favor of any person, if the destruction of his property was caused by his illegal or improper conduct. The defendant, for the purpose of proving that the loss of plaintiff's property grew out of his illegal and improper conduct, offered evidence that its destruction was the act of soldiers justly enraged at articles in the plaintiff's periodical reflecting on the conduct of the war, and imputing to the officers and men constituting the army of the nation cowardice, murder, and robbery. The court held that, as the charges were made against a body of men, without specifying individuals, that probably no single soldier could maintain any action therefor; but that an indictment might nevertheless have been found and successfully prosecuted therefor, because it tended to a breach of the peace, and to the disturbance of society at large. Upon the question whether the publications made by plaintiff were defensible as criticisms on the conduct of public affairs, made in good faith and for justifiable motives, the court said: "Conductors of the public press have no rights but such as are common to all: *Sheckell* v. *Jackson*, 10 Cush. 25-27. But in this country every citizen has a right to call the attention of his fellow-citizens to the maladministration of public affairs, or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses or to defeat the re-election or reappointment of an incompetent officer. If information, given in good faith, to a private individual of the misconduct of his servants is 'privileged,' equally so must be the communication to the voters of a nation concerning the misconduct of those whom they are taxed to support, and whose continuance in any service virtually depends on the national voice. To be effectual, the latter communication must be made in such form as to reach the public. If the end which Palmer had in view — the controlling, moving purpose of the publication — was to inform the public of the manner in which the war was conducted, for the purpose of inducing citizens to use their influence with government to repress abuses, or to vote for members of Congress and other elective officers who would check such abuses, reform the army, stop the war, or conduct it in a more humane manner, his end or motive was justifiable. If the end to be attained is 'to give useful information to the community, or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful': Parker, C. J., in *State* v. *Burnham*, 9 N. H. 34, 41, 42; 31 Am. Dec. 217. If such were Palmer's motives, he is not guilty of libel, if the facts he alleged were true, or if he had probable cause to believe, and did believe, that they were true. But if he had no justifiable

motive, inasmuch as the natural and inevitable tendency of the publication is to injure and degrade, he is guilty of libel, even though the facts alleged in the article were true."

In *Miner* v. *Detroit Post and Tribune Co.*, 49 Mich. 358, the alleged libel consisted of reflections upon the plaintiff's conduct as a justice of the peace, the substance of which was, that when a complaint had been filed in his court against a Chinaman, the judge, without the assent of the complainant, had inserted the name of another and different Chinaman; that though the evidence completely exonerated this second man, he was held for trial under heavy bonds; that his being so held was an inexcusable outrage; that if the justice would enforce the law against the violation of the liquor and gambling laws, when they were brought before him, people would be more lenient in their judgment, but instead of so doing he turns upon a helpless Chinaman, who has no political influence. The trial court ruled that so much of the defamatory article as related to the enforcement of the liquor and gambling laws was privileged, but that the imputations concerning the holding for trial of the Chinaman were not. The appellate court dissented from this latter ruling, and in an opinion by Mr. Justice Cooley, said: "When a judge orders a man into confinement without a charge against him, he deprives him of liberty without due process of law, and in doing so violates the earliest and most important guaranty of constitutional freedom. When in a case where bail is of right, he demands security in a sum which, considering the position in life and probable means and ability to give it, of the person accused, is altogether beyoud his power, the demand is unreasonable, and for that reason is repugnant to a further provision of the constitution, the importance of which is only second to the other. There must be some great and most serious defect in the administration of the law when such things can take place, and the matter is one which concerns every member of the political community; for if constitutional principles fail to protect the most humble of the people, they protect no one. The defendant contends that to call public attention to what so vitally concerns the public is matter of privilege; and that, by presumption of law, its motives in doing so must be deemed proper, and not actuated by malice. The trial judge denied this claim altogether. In doing so he put the case precisely on the same footing with publications which involve merely private gossip and scandal. The truth was allowed to be a defense, if made out, and so it would have been if the injurious charge which was published had been one in which the public was not concerned. If there is no difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave personal concern, then this judgment may be right, and should be affirmed. But it is very certain, I think, that no declaration of this or any other court can convince the common reason that the distinction is not plain and palpable. Few wrongs can be greater than the public detraction which has only abuse, or the profit from abuse, for its object. Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty. I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern involving public wrongs, and the publication of personal scandal, come under the same condemnation of the law; for this inevitably brings the law itself into contempt, and creates public sentiment against its enforcement. If a law is to be efficiently enforced, the approval of the people must attend its penalties, and there must be some presumption, at least, that an act which it punishes involves some element of wrong-doing.

If, *prima facie*, the punishment is as likely to be inflicted for a right act as for a wrong act, the violation of law will not only be without disgrace, but the reckless libeler, when ranked by the law in the same company with respectable and public-spirited journalists, will shield himself to some extent behind their commendable public spirit, and will find some protection for his license in the public opinion which condemns the law which it cannot respect."

That a candidate for an elective office puts in issue his fitness for the office in question, is undoubted; and there can be but few, if any, public offices or trusts in respect to which a good moral character is not an essential element of fitness. In every species of service, whether public or private, fidelity is a requisite the absence of which no other qualities can adequately supply; and a probable want of fidelity may reasonably be anticipated from one who has previously been guilty of any breach of trust, or has engaged in any single act or any persistent course of conduct indicative of a willingness to disregard the principles of right. Therefore, in the discussion of the fitness of a candidate for an office which he seeks, or which others seek to impose upon him, his moral character and much of his private life are relevant. As the question of the fitness of the candidate affects the whole people, it may be discussed before the whole people; and every person who engages in the discussion, whether in private conversation, in public speeches, or in periodicals, may, while keeping within proper limits, and acting in good faith, be regarded and protected as one in the discharge of a duty.

But, conceding that the fitness, and, incidentally, the character of a candidate are in issue, and that every citizen is under a duty to assist in determining the issue, does not, necessarily, carry with it the further concession that he may, if he can, determine the issue by the aid of foul means as well as of fair. Certainly he may not be knowingly a false witness. The doubtful question is, whether, though he does not assert what he knows to be false, he may, without being responsible to the injured party, affirm that which is known to be defamatory, and is not known to be, and is not, true. The people have an interest in the character of the candidate; but both he and they have an interest that they shall not be induced to reject him through false aspersions against his character and previous conduct. The exigencies of an impending election often require prompt action. An accusation must sometimes be accepted or rejected, in the absence of a full opportunity to either obtain or duly weigh all the evidence bearing upon it; and it may, though false, be republished in a periodical by those who act in good faith, and in the belief that it is true, and ought to be known to all persons entitled to vote for or against the candidate upon whom it reflects. On the other hand, to grant immunity to political libelers, in all cases where their bad faith and malice in fact cannot be established by the libeled candidate, leads to the grossest abuse of the privileges of the press, including the flooding of the country with shrewdly conceived libels, purposely withheld until it is too late for their refutation or denial before the voting is to take place. These conflicting considerations have necessarily led the judiciary to conflicting decisions, one class of which inclines to protect candidates against false and defamatory statements concerning their private acts and characters, and the other class of which, in effect, though not in express terms, abandons them to all the furious tempest of defamation which either personal spite or personal or political self-interest may engender, leaving them no other protection than such as may be found in denial, in resort to counter-defamation, and sometimes to personal violence.

We shall first refer to decisions which, in our judgment, belong to the

class last mentioned. In *Briggs* v. *Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, it appeared that the plaintiff was a judge of one of the courts of the city of Philadelphia, and was a candidate for re-election; that at a meeting of an association of citizens a letter was read, which, in substance, charged that a certain steal had been made possible through Judge Briggs's instructions to the jury. The defendant was the person who brought this letter to the meeting of the association, and caused it to be read in the presence and hearing of the reporters of the city press and others. As a matter of fact, Judge Briggs did not preside at the trial intended to be referred to in the letter, and the charge which was delivered by the judge who did preside at such trial "was fair, impartial, and in every way proper." The appellate court conceded that the charge contained in the letter was false, defamatory, and libelous; but maintained that as it was a charge made by a citizen against a candidate for office, it was a matter in which all the electors had an interest; that, as such, the defendant, unless he knew it to be false, had a right to communicate it to the meeting at which the reporters were present; that it was, in effect, a privileged communication; and, finally, that the plaintiff was entitled to no redress, "because of a rule of policy of far more importance than the inconvenience of a single citizen. That rule requires that free discussion, especially upon political topics and candidates, shall not be so hampered as to make it dangerous." In *Marks* v. *Baker*, 28 Minn. 162, the facts were, that, while the plaintiff was a candidate for re-election to the office of city treasurer, the defendants, who were residents and taxpayers of the city, published in a periodical of such city an article calling attention to a discrepancy between certain official reports, from which the inference might reasonably be drawn that the plaintiff had not charged himself with all moneys received by him as such treasurer, but had, on the other hand, embezzled some of them. An action having been brought for libel in making the publication mentioned, the defendants, in their answer, alleged that the publication was made in good faith; that they believed, at the time of making it, there was reasonable cause therefor, and that they were discharging a sacred and moral obligation as editors and publishers. At the trial, they admitted that, notwithstanding the discrepancy which existed, and to which they had called attention, the plaintiff had in fact accounted for all moneys received by him in his official capacity, and that any charge or insinuation to the contrary was false. The defendant Baker, being called as a witness for the defense, was permitted, as against the objection and exception of the plaintiff, to testify that, at the time of making the publication complained of, he believed it to be true; that he published it for the general interest, and for no other purpose; and that he did not intend to charge the plaintiff with embezzling any sum whatever. A judgment was entered in favor of the defendants; and upon an appeal therefrom, the admissibility of the evidence offered in their behalf was sustained. The court held that the subject-matter of the publication was one of public interest in the community of which the defendants were members, that it was therefore a privileged communication, if made in good faith, and that it was made in good faith, if the defendants published the article believing it to be true, and with a good motive or for a good object, and without any intention to do wrong, and with an affirmative intention to do that which, in view of the fact that the subject-matter of the article published was one of public interest, was right, and in a certain sense a duty; and furthermore, that, whether this intention established the full defense of a privileged communication or not, it was admissible, as showing mitigating circum-

stances, under the statute of Minnesota providing that, in an action for libel or slander, "the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and whether he proves a justification or not, he may give in evidence the mitigating circumstances." We understand the courts of Texas to be in substantial harmony with those of Minnesota respecting the questions now under consideration: *Express Printing Co.* v. *Copeland*, 64 Tex. 354. In Iowa and Kansas, the liability of the publisher of a periodical for libel published of a candidate for office has not, as far as we are aware, been directly in question; but, in those states, it is clear that an elector who speaks or writes to other electors defamatory words respecting a candidate for office is not answerable therefor, if such elector, at the time, believed what he thus communicated to his fellow-electors to be true, and acted in good faith and with justifiable motives in making the communication: *Bays* v. *Hart*, 60 Iowa, 251; *State* v. *Black*, 31 Kan. 465; *Mott* v. *Dawson*, 46 Iowa, 533.

The device of calling as a witness a defendant who has published of another that which is admitted to have been both false and defamatory, and who is being pursued in the courts for this grievous wrong, and having him testify that his motives were pure, his conduct actuated by an irresistible impulse to promote the public weal, and that, upon the whole, he regards himself as having acted the part of an exceptionally praiseworthy citizen "discharging a sacred and moral obligation as editor and publisher," has the recommendation of simplicity and effectiveness. The simplicity might, however, be still further simplified by dispensing with court, jury, and other witnesses, and submitting the question to the defendant without argument. The only safe evidence of a man's motives must relate to his acts, and to the circumstances under which he acted; and if he calls another man a felon, he must be conclusively presumed to intend to injure that man; and if the charge is false, he ought not to be permitted to shield himself from making just compensation, by interposing between himself and his victim the insubstantial form of his self-assumed public spirit, "discharging a sacred and moral obligation as editor or publisher." The better opinion, and the one sustained by the preponderance of the authorities, both English and American, is, that false and defamatory publications concerning the acts or character of a candidate are not privileged, and are actionable: *Onslow* v. *Home*, 3 Wils. 177; 2 W. Black. 750; *Harwood* v. *Astley*, 1 Bos. & P., N. R., 47; *Parkhurst* v. *Hamilton*, 3 Times L. R. 500. "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate": *Duncombe* v. *Daniell*, 8 Car. & P. 222; 2 Jur. 32; 1 W. W. & H. 101. "The authorities fully sustain the position that a publication in a newspaper, made either of a public officer or a candidate seeking an office from the votes of the people, which imputes to him a crime or moral delinquency, is not a privileged communication, either absolute or conditional; but such publication is *per se* actionable, the law imputing malice to the author or publisher": *Sweeney* v. *Baker*, 13 W. Va. 158; 31 Am. Rep. 757. "If one accuse another of crime, he is presumed to make a false accusation; and malice is inferred from the falsehood. That the plaintiff was a candidate for office is no excuse for slandering him. We have no right to tell a lie of another because he is a candidate for office, or is in office; though we may speak the truth of him, we have no right to bear false witness against our neighbor. It would subvert our government

to allow the promulgation of falsehood, which would drive from office men who regard character, and leave it only to those without any": *Seeley* v. *Blair*, Wright, 358. "The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress, and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. 'Slander,' says Judge Overton, 'is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people when in the exercise of one right you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed, but no falsehoods be propagated.' To hold that false charges of a defamatory character made against a candidate are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensible and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled, and unworthy; to men who have no character to lose, and no reputation to blemish": *Bronson* v. *Bruce*, 59 Mich. 467; 60 Am. Rep. 307. When, therefore, the publisher of a periodical falsely charges a candidate with having been guilty of crimes or immoral practices, he cannot escape liability on the ground that the publication was made with good motives and for justifiable ends, without malice, and in the honest belief that the occasion required it: *Bronson* v. *Bruce, supra; Jones* v. *Townsend*, 21 Fla. 431; 58 Am. Rep. 676; *King* v. *Root*, 4 Wend. 113; 21 Am. Dec. 102; *Aldrich* v. *Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Curtis* v. *Mussey*, 6 Gray, 261; *Rearick* v. *Wilcox*, 81 Ill. 77. But if the charge was substantially true, though not correct in some particulars, or in the proper technical designation of the crime charged, and was made in good faith, and for justifiable motives, and by one who honestly believed it to be true, all these facts may be received in evidence, not as a technical justification, but as establishing that the plaintiff had suffered no substantial injury: *Bailey* v. *Kalamazoo Pub. Co.*, 40 Mich. 251.

An attack upon a candidate, if otherwise privileged, must not be given a wider publicity than is necessary to accomplish the purposes which the publisher professes to seek. If the office is to be filled by appointment, or by an election in which only the members of a certain board or tribunal can participate, there can be no justification of a false and defamatory publication in the public press, and which must reach, and be intended to reach, a large number of persons who have no share in filling the office to which the person libeled is an aspirant: *Hunt* v. *Bennett*, 19 N. Y. 173.

In accordance with the principles announced in the decisions heretofore referred to as maintaining the better opinion concerning the defamation of candidates, the following charges have been held not to be privileged, and, when false, to be actionable: That the candidate had committed perjury: *Seeley* v. *Blair*, Wright, 358; or forgery: *Seeley* v. *Blair*, Id. 686; "was a scoundrel, a coward, a liar, an assassin, and a murderer": *Harwood* v. *Astley*, 4 Bos. & P. 47; had been guilty of cheating in two specified transactions: *Duncombe* v. *Daniell*, 8 Car. & P. 222; 2 Jur. 32; 1 W. W. & H. 101; was a professional gambler, a representative from the prize-ring or gambling-den,

a bully, and black-leg, one "whom you would n't trust in your hen-coop": *Sweeney* v. *Baker*, 13 W. Va. 158; 31 Am. Rep. 757; was a forger, had stolen the deposits of poor men and women, and cheated laboring men out of their hard earnings: *Bronson* v. *Bruce*, 59 Mich. 467; 60 Am. Rep. 307; had been indicted for not canceling stamps on empty liquor-casks: *Jones* v. *Townsend*, 21 Fla. 431; 58 Am. Rep. 676; had "committed a misdemeanor, for which he was arrested and tried for his life, was arraigned at the bar in the state of North Carolina, and I will show it in black and white": *Brewer* v. *Weakley*, 2 Over. 99; 5 Am. Dec. 656; was in a drunken condition, and as such the object of loathing and disgust while acting as presiding officer of a state senate: *King* v. *Root*, 4 Wend. 113; 21 Am. Dec. 102; had been guilty of "legal Jesuitism," and in making a decision had acted from partisan and ignoble motives: *Curtis* v. *Mussey*, 6 Gray, 261; had been guilty of entering into a corrupt understanding with certain persons to control the political and legislative power of the state with a view to his own advantage, and to the serious injury of the public; and, if elected, would use his influence to embarrass and defeat a great public improvement: *Powers* v. *Dubois*, 17 Wend. 63.

If a publication consisting of an aspersion of a candidate can fairly be deemed a mere criticism, or an opinion which the author or publisher has drawn of his fitness for the office sought, and not as an assertion of a fact involving moral delinquency, it is privileged. Thus in *Sweeney* v. *Baker*, 13 W. Va. 158, 31 Am. Rep. 757, it was said that "as when the alleged libels were published, the plaintiff was a candidate for popular suffrage, any allegations which referred to his fitness for the office he sought, mentally or physically, were privileged communications, and could not be the basis of a libel suit; nor any other allegations which did not refer to his moral character, though they were ever so harsh and uncomplimentary." It was therefore held that such charges as merely implied that the candidate was "an uneducated, lazy, and ignorant man, and as such unfit to represent the people," were not actionable, though "expressed in coarse and harsh language." Words imputing to a candidate mental weakness resulting to his mind from disease, and impairing it to the extent of disqualifying him for the proper discharge of the duties of the office, are not actionable: *Mayrant* v. *Richardson*, 1 Nott & McC. 347; 9 Am. Dec. 707.

The rule which permits adverse newspaper criticism of public officials is justified upon the ground that they have assumed duties toward the public; that the public has an interest in the proper performance of those duties; and that publications made in good faith, and for the purpose of advising the public of the conduct of its servants, may fairly be regarded as made in the discharge of a duty which every citizen owes to his fellow-citizens. The same reasoning must justify criticism of all other persons who, though not public officers, voluntarily assume duties of a public nature, in the fit performance of which large numbers of persons have an interest. The most familiar instances are clergymen and teachers of public and private schools. Their private characters and motives may not be safely maligned by the press. To falsely impute to them the commission of crimes or of acts which, though not punishable as criminal, are obviously grossly at variance with their callings, and such as, if true, ought to deprive them of their positions, is actionable: *Chaddock* v. *Briggs*, 13 Mass. 248; *McMillan* v. *Buch*, 1 Binn. 178; *Demarest* v. *Haring*, 6 Cow. 76; *Hayden* v. *Cowden*, 27 Ohio St. 292; *Highmore* v. *Harrington*, 3 Com. B., N. S., 142; *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011; *Gathercole* v. *Miall*, 15 Mees. & W. 319; 10 Jur. 337; 15 L. J. Ex. 179. But the conduct of public worship by

a clergyman, and the uses to which he puts his church and vestry, are lawful subjects of public comment: *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; 14 Week. Rep. 51; 13 L. T., N. S., 255; 35 L. J. Q. B. 940; 12 Jur., N. S., 940. In *Press Company* v. *Stewart*, 119 Pa. St. 584, it was determined that one who had opened a school, to which he attracted attention by advertisements of an extraordinary nature, and wherein he assumed to teach his patrons the arts of shorthand writing, type-writing, and phono-scribing, became "thereby a *quasi* public character"; that "whether he was a proper person to instruct the young, and whether his school was a proper place for them to receive instruction, were matters of importance to the public"; that the newspaper "was in the strict line of its duty when it sought such information, and gave it to the public; and if that information tended to show that the plaintiff was a charlatan, and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it."

Directors and other managers of *quasi* public corporations, such as railways, may also, when dealing with great enterprises by which the citizens of large portions of a state or nation may be affected, may properly be regarded as public persons, and subjected to hostile criticism as such: *Crane* v. *Waters*, 10 Fed. Rep. 619; 26 Alb. L. J. 212.

In California it has been held that the office of director of a mining corporation should not be regarded as a public office, exposing its holder to the same liberty of adverse criticism to which public officials are subjected. In determining this question, the supreme court of that state said: "Another point made by the defendants is, that the publication was privileged, and that the defendants could not be held liable except on the proof of express malice, of which, it is claimed, there was no evidence whatever. It is said to be privileged, because it was published by public journalists as a matter of general and peculiar interest, and related to the conduct of plaintiff in his capacity of trustee of a mining corporation. But this was a private, and not a public, corporation. The plaintiff was in no sense a public officer, and was responsible only to the stockholders and creditors of the corporation for the fidelity of his conduct as a trustee. His office was no more a public office than that of a trustee of a private corporation to build a bridge or construct a wagon-road. Officers of this character have never been deemed public officers in such sense as to render them amenable to criticism, as in case of persons filling public offices of trust and confidence, in the proper administration of which the whole community has an interest. In the latter class of officers public policy demands that the official conduct should be open to unrestricted criticism, in which no malice is implied by law; and express malice must be proved, to render the author liable. No case has been cited, nor am I aware of any, which holds that the trustee of a private corporation is a public officer in the sense claimed by the defendants. Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case, that I am aware of, has ever gone so far. But while such publication cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstance under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest, and a due regard to the freedom of the press, demands that its conductor should not be mulcted in punitive damages for publication on subjects for pub-

lic interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publication in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff in respect to malice, there would be but little security for private character": *Wilson* v. *Fitch*, 41 Cal. 363.

Authors, artists, and all other persons voluntarily exposing the result of their labors to the public, seeking to gain favorable recognition of their work if found to be meritorious, become public characters, so far, at least, as their works are concerned. Any periodical may publish an estimate of such works, whether favorable or unfavorable; and if unfavorable, it may use strong terms of condemnation, and expose the work to merciless ridicule. No action can be sustained for such adverse criticism, unless it is shown or on its face it appears to be actuated by malice in fact: *Tabart* v. *Tepper*, 1 Camp. 351; *Carr* v. *Hood*, 1 Id. 355, note; *Thompson* v. *Shackell*, Moody & M. 187; *Soane* v. *Knight*, 1 Id. 74. A condemnatory criticism of a literary work or of a painting, though imputing profanity or indecency, will be excused, unless so unfair and reckless in its character as to justify the presumption of malice: *Strauss* v. *Francis*, 4 Fost. & F. 1107; 15 L. T., N. S., 674. An author may be written of so far as he is connected with the work which he has given to the public, but criticism of his work must not be used as a pretext for an attack upon his private character or reputation; and if a critic, while professing to give an estimate of a literary work, proceeds to attack the author and to impute to him either the commission of offenses or of being actuated by dishonorable motives, either in the work under consideration or in other works or respects, then the publisher may be guilty of libel. In other words, it is only the work, and the author as he exhibits himself in the work, which are subject to criticism, to the extent that such criticism, even though erroneous, will not subject the publisher to an action for libel. To the work the author has invited criticism. It is otherwise with his acts and life, of which the work so offered for public consideration is no part. For any defamation of an author or artist not necessarily connected with his public works, the publisher of such defamation is answerable, though it may have been published as a part of a professed criticism of such work: *Cooper* v. *Stone*, 24 Wend. 434; *Fraser* v. *Berkerley*, 7 Car. & P. 621; *Macleod* v. *Wakeley*, 3 Id. 311; *Stewart* v. *Lovell*, 2 Stark. 93. A public entertainment of any character is always a proper subject for criticism in a periodical: *Ryan* v. *Wood*, 4 Fost. & F. 734; and so is any thing or article which by its owner is made the subject of public exhibition: *Gott* v. *Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

The case last cited was an action to recover damages for an alleged false and malicious statement concerning the plaintiff's property, a stone statue, commonly known as the "Cardiff Giant." The plaintiff claimed that the statue was of great value as a scientific curiosity, and, for the purpose of exhibition, had long been a source of profit to him. It appeared at the trial that the defendant had published a statement that the Cardiff Giant had been sold for eight dollars; that "the man who brought the colossal monolith to light confessed it was a fraud"; that the plaintiff was on the eve of effecting a sale of one half of his interest in the statue for several thousand dollars, and that the purchaser refused to carry out the agreement because of the defamatory statement made by the defendant. The judgment of the trial court was in favor of the defendants; but it was reversed by the appellate court because of error in giving instructions at the instance of the de-

fendant, and also in refusing to give an instruction requested by the plaintiff. In considering the law applicable to the subject, the appellate court said: "This action is not for a libel upon the plaintiff, but for publishing a false and malicious statement concerning his property, and could not be supported without allegation and proof of special damages: *Malachy* v. *Soper*, 3 Bing. N. C. 371; 3 Scott, 723; *Swan* v. *Tappan*, 5 Cush. 104. The special damage alleged was the loss of the sale of the plaintiff's statue to Palmer. Evidence of the value of the statue as a scientific curiosity or for purposes of exhibition was therefore rightly rejected as immaterial. The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice: *Dibdin* v. *Swan*, 1 Esp. 28; *Carr* v. *Hood*, 1 Camp. 355; *Henwood* v. *Harrison*, L. R. 7 Com. P. 606. But in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in reckless disregard of his rights, and of the consequences that may result to him: *Commonwealth* v. *Bonner*, 9 Met. 410; *Moore* v. *Stevenson*, 27 Conn. 14; Erle, C. J., in *Hibbs* v. *Wilkinson*, 1 Fost. & F. 608, 610; and in *Paris* v. *Levy*, 2 Id. 71, 74, and 9 Com. B., N. S., 342, 350; Cockburn, C. J., in *Morrison* v. *Belcher*, 3 Fost. & F. 614, 620; in *Hedley* v. *Barlow*, 4 Id. 224, 231; and in *Strauss* v. *Francis*, 4 Id. 1107, 1114. The only definition of malice given by the learned judge who presided at the trial was therefore erroneous, because it required the plaintiff to prove 'a disposition willfully and purposely to injure the value of this statue,' as well as 'wanton disregard of the interest of the owner.' The jury, upon the evidence before them, and under the instruction given them, may have been of opinion that the defendant's statements that the plaintiff's statue was an 'ingenious humbug,' 'a sell,' and 'a fraud,' were false, reckless, and unjustifiable, and had the effect of injuring plaintiff's property, and caused him special damage; and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury."

We have heretofore shown that, as a general rule, the publication of a libelous charge could not be justified on the ground that it was merely a repetition of what had before been stated or published, and that the defendant had merely republished it as a matter of news, and for the purpose of informing the public of existing events of which he, being the publisher of a periodical, had assumed the duty of keeping the public informed. An exception to this rule exists in the proceedings taking place in the legislative and judicial departments of the government, and in the proceedings of some other public tribunals or departments, of which, upon grounds of public policy, it is regarded as proper to keep the public fully informed, though thereby libelous charges may be republished.

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the

welfare of the community depends. Where would be our confidence in the government of the country, or in the legislature, by which our laws are framed, and to whose charge the great interests of the country are committed, — where would be our attachment to the constitution under which we live, — if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation?" *Wasson* v. *Walter*, 8 Best & S. 671; L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 19 L. T., N. S., 409; 17 Week. Rep. 169. Fair reports of the proceedings of legislative bodies, in which the public has an interest, including the speeches of their members and reports made by committees, may be published in periodicals without entitling any one falsely defamed thereby to maintain an action for libel against their proprietors: *Wasson* v. *Walter*, *supra*; *Rex* v. *Wright*, 8 Term Rep. 293; *Kane* v. *Mulvanis*, 2 I. R. C. L. 402; *Henwood* v. *Harrison*, 41 L. J. C. P. 206; L. R. 7 Com. P. 606; 20 Week. Rep. 1000; 26 L. T., N. S., 938; *Curry* v. *Walter*, 1 Bos. & P. 525; 1 Esp. 457. Periodicals are also privileged to publish the testimony taken before an investigating committee of a legislative body: *Terry* v. *Fellows*, 21 La. Ann. 375. There is probably attached to the general rule authorizing the publication of such testimony the limitation that the proceeding in which it was taken must not be secret and *ex parte*: *Belo* v. *Wren*, 63 Tex. 686. The privilege which secures immunity for the publication of fair reports of the proceedings of Parliament, of Congress, and of the state legislatures, extends to minor legislative bodies, such as town councils, with the same limitation, that the proceedings must have been open and public: *Wallis* v. *Beget*, 34 La. Ann. 131; *Allbutt* v. *General Council*, L. R. 23 Q. B. D. 400.

The public undoubtedly has an interest in the proceedings of all courts of justice, whether civil or criminal, superior or inferior. In all cases where the proceedings of such courts are open to the public, so that any individual who may choose has the right to be present to see what is done and to hear what is said, he may, though not present, be given the same information through the columns of a periodical that he might have secured by his presence in court: *McBee* v. *Fulton*, 47 Md. 403. "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings": *Rex* v. *Wright*, 8 Term Rep. 298.

Cockburn, C. J., instructed the jury as follows, upon this topic, at the trial of the case of *Risk Allah Bey* v. *Whitehurst*, 18 L. T., N. S., 615: "Whatever may have been thought in past times, nowadays we are agreed on this, that fair and impartial reports of the proceedings in courts of justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage that the publishing of them to the world predominates so much over the inconvenience to individuals as to render these reports highly conducive to the public good; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest, and impartial. It need not be a report of every word that passes upon a trial. No newspaper, however large, could report the proceedings in the full extent to which, upon a long trial, these proceedings necessarily extend. You may either have it to the utmost possible extent the limits of the paper will allow it to be given, or in the more condensed form of a summary or epitome, but you must have the report honest and fair. A paper may give a report of the proceedings of courts of justice properly condensed and fair, but it is not entitled, under pretense of giving a report, to add comments of its own, or to display facts not brought forward

in the proceedings, but coming out of the reporter's own head. This is admitted on all hands to be the state of law."

If the proceedings are such that the court deems them unfit for publication, and therefore sits with closed doors, or enters an order prohibiting the publication, either of the whole proceedings or of some part thereof, doubtless no periodical could have any privilege of publishing that which the court had expressly or impliedly declared ought not to be generally known; and any publisher violating the injunction of secrecy would surely be answerable in damages for any libel included in his publication. If the subject-matter of the trial was itself a blasphemous or obscene libel, no right to indefinitely repeat or publish it could be gained from the fact that it had been made the subject of judicial investigation and condemnation: *Rex* v. *Carlile*, 3 Barn. & Ald. 167; *Steele* v. *Brannan*, L. R. 7 Com. P. 261; 41 L. J. M. C. 85; 20 Week. Rep. 607; 26 L. T. 509. But a fair report of the proceedings of a public trial, including the testimony of the witnesses, the arguments of counsel, the remarks of the judge during the progress of the cause, and his final instructions to the jury, are all matters which any one, whether the proprietor of a periodical or not, is privileged to publish. The proceedings need not be published in full. They may be greatly condensed; but still, however condensed, they must be a fair statement of what took place, and must not, by their omission of exculpatory and their emphasis of inculpatory evidence or remarks, deal unjustly with an accused person, and thereby produce an impression of guilt which a candid statement of the whole proceedings would be unlikely to create. Any report in a periodical of judicial proceedings, whether in full or a mere synopsis, is privileged, unless it appears to have been made for malicious or unworthy motives, or is so manifestly unfair as to evince, either an intent to injure the person complaining, or a reckless indifference as to whether he should be injured or not: *Barrows* v. *Bell*, 7 Gray, 301; 66 Am. Dec. 479; *Cincinnati Gazette Co.* v. *Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *Smith* v. *Scott*, 8 Car. & K. 580; *Hoare* v. *Silverlock*, 9 Com. B. 20; 19 L. J. Com. P. 215; *Turner* v. *Sullivan*, 6 L. T., N. S., 130; *Runge* v. *Franklin*, 72 Tex. 585; 13 Am. St. Rep. 833; *Risk Allah Bey* v. *Whitehurst*, 18 L. T. 615.

Unquestionably a sound public policy demands that periodicals shall, to a certain extent at least, be privileged to publish the proceedings of courts of justice; but this policy extends no further than keeping the public advised of the acts of their judicial servants, in order that abuses may be corrected, worthy service rewarded by continuing confidence and renewed trust, and unworthy service visited by opprobrium, and cut short by the withdrawal of public confidence and the selection of a more worthy minister of justice. Whether the judiciary has properly discharged its functions in any given instance can only be known from a report of everything upon which its action was based. Hence public policy will not permit any suitor or other person to complain of the publication of any part of the proceedings at a public trial, on the ground that it may injuriously affect his reputation. But a garbled or one-sided statement of what took place, or the publication of the contents of a petition or affidavit upon which the court has never been and may never be called to act, is prohibited, rather than demanded, by public policy, and contributes to no other end so surely as that of assaulting the reputation of one who has, as yet, no opportunity to repel the assault. Garbled or one-sided statements are nowhere favored; and a publication of the defamatory evidence of a witness, or the still more defamatory invective of counsel, is not privileged, where it does not amount to a fair statement of the whole evidence

bearing upon the reputation of the person against whom it reflects: *Saunders* v. *Mills*, 3 Moore & P. 520; 6 Bing. 213; *Kane* v. *Mulraine*, 2 I. R. C. L. 402.

The publication of an *ex parte* pleading or affidavit before a trial is manifestly as unfair as is the publication of a one-sided statement of what occurs at the trial itself. In either case there is likely to be an unjust aspersion on the reputation of some one who has no opportunity to reply, and in neither is any sound public policy subserved by permitting a statement to be made with impunity, if false and defamatory. There was formerly a very strong judicial inclination against regarding as privileged any publication of an *ex parte* proceeding, or of any matter of evidence or of pleading taken or filed prior to the commencement of the trial: *Hoare* v. *Silverlock*, 9 Com. B. 23; 19 L. J. Com. P. 215; *Duncan* v. *Thwaites*, 3 Barn. & C. 556; *Purcell* v. *Sowler*, 2 Com. P. Div. 215; 46 L. J. Com. P. 308; 25 Week. Rep. 362; 36 L. T. 416. It is now settled in England that the mere fact that a judicial proceeding was *ex parte* will not deprive a publication of what took place in open court of protection as being privileged. Thus where a statement was published that three gentlemen, civil engineers, had applied to a magistrate for criminal process against another civil engineer, and that their spokesman stated that they had been engaged in certain surveys, and that their money, or some portion of it, had been paid to the other engineer, who had withheld it, and in their judgment had been guilty of the criminal offense of withholding the money, but that the magistrate had regarded it as a matter of contract between the parties, and, though on the face of the application they had been badly treated, said he must refer them to the county court, it was held that if the publication complained of was a fair and impartial report of what took place before the magistrate that it was privileged: *Usill* v. *Hales*, L. R. 3 C. P. D. 319; 47 L. J. Com. P. Div. 323; 38 L. T., N. S., 65; 26 W. Rep. 371. In England, publication of proceedings before magistrates of the preliminary examination of a prisoner: *Regina* v. *Gray*, 10 Cox C. C. 184; *Lewis* v. *Levy*, El. B. & E. 537; 4 Jur., N. S., 970; 27 L. J. Q. B. 282; or before judges at chambers: *Smith* v. *Scott*, 2 Car. & K. 580; or before registrars in bankruptcy upon the examination of a debtor: *Rayalls* v. *Leader*, L. R. 1 Ex. 296; 12 Jur., N. S., 503; 4 N. & C. 555; 35 L. J. Ex. 185; or before examiners to inquire into the sufficiency of sureties, — are all privileged, whether *ex parte* or not: *Cooper* v. *Lawson*, 8 Ad. & E. 746; 1 W. W. & H. 601; 2 Jur. 919; 1 Perry & D. 15.

In all these instances the proceedings, though *ex parte*, take place before a judicial or *quasi* judicial tribunal; and the decisions treating their publication as privileged do not necessarily authorize the publication of other *ex parte* matters upon which no action has been taken. Early English decisions have condemned the publication of depositions taken for use, but not yet used, at a trial: *Carr* v. *Jones*, 3 Smith, 491; *Stiles* v. *Nokes*, 7 East, 493; *Rix* v. *Fisher*, 2 Camp. 563. In this country, the fact that a party has been arrested, and what is the charge against him, may be published, provided no assumption of his guilt is implied in the language used: *Usher* v. *Severance*, 20 Me. 9; 37 Am. Dec. 33; *Tresca* v. *Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198. The tendency of the American cases is to limit the privilege of publishing judicial proceedings to matters which take place in public, either at the trial or at some other hearing of the case in open court, or if not in open court, then at some place and before some officer or tribunal where the public have a right to be present. Thus in Michigan, it has been said "that there is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of other matters in litigation. The parties, and none but the parties,

control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is, that the pleadings are addressed to courts, where the facts can be fairly tried, and to no other readers. If the pleadings and other documents can be published to the world by any one who has access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting these printed as news. The public has no right to any information on private suits until they come up for public hearing or action in open court; and when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or, on trial, the case may easily fail of proof or probability. The law has never authorized any such mischief": *Park* v. *Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. Hence a pleading filed in a cause containing libelous assertions, but which has never been presented to the court for its action, or for the determination of the truth or falsity of its allegations, may not, nor may any portion of its contents, be published in a periodical, and the publication protected as a publication of privileged matters: *Barber* v. *St. Louis Dispatch Co.*, 3 Mo. App. 377; *Park* v. *Detroit Free Press Co., supra;* nor may *ex parte* charges and affidavits filed in a criminal proceeding, or in proceedings taken to procure the disbarment of an attorney, be published as privileged. "If a publisher of a newspaper may, in virtue of his vocation, without responsibility, publish the details of every criminal charge made before a police-officer, however groundless, and whether emanating from mistake, or malice of a third person, then must private character be indeed imperfectly protected. Such publications not only inflict injury of the same kind with any other species of defamation, but their tendency is also to interfere with the fair and impartial administration of justice, by poisoning the public mind, and creating a prejudice against a party whom the law still presumes to be innocent": *Cincinnati* v. *Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *Cowley* v. *Pulsifer*, 137 Mass. 392; 50 Am. Rep. 318. The report of a justice of the peace of statements made by certain persons to him on applying for a warrant, which statements have not been incorporated into an affidavit or other paper on file, nor made the subject of any judicial action, cannot be published as a privileged matter: *McDermott* v. *Evening Journal Association*, 43 N. J. L. 488.

If a proceeding is such that a periodical has a right to make it public, such periodical may, nevertheless, be held answerable for damages, if it appears to have acted from malicious motives: *Stevens* v. *Sampson*, L. R. 5 Ex. Div. 53; 49 L. J. Ex. Div. 129; 41 L. T., N. S., 782.

As before suggested, a publication of judicial proceedings is not privileged, unless it is fair and impartial. It must not be accompanied by any malicious or defamatory comment: *Cincinnati Co.* v. *Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285; *State* v. *Nokes*, 7 East, 493; *Carr* v. *Jones*, 3 Smith, 49; or libelous insinuations: *Commonwealth* v. *Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Thomas* v. *Crosswell*, 7 Johns. 264; 5 Am. Dec. 269; *McNally* v. *Oldham*, 16 I. R. C. L. 293; 8 L. T., N. S., 604; *Scripp* v. *Reilly*, 38 Mich. 10; *Delegal* v. *Highley*, 5 Scott, 154; 5 Bing. N. C. 950; 8 Car. & P. 444; or statments drawn from other sources; *Bathrick* v. *Detroit Post Pub. Co.*, 50 Mich. 629.

A periodical is not prohibited from commenting upon the proceedings in a court of justice, or the parties or witnesses connected therewith, nor is it limited to the bare recital of what took place; but whatever comments it makes must be just and fair, "and it is for the jury to say whether they are

so or not": *McBee* v. *Fulton*, 47 Md. 403. The comments must be from the facts in evidence, and if there is any departure from them, or if a one-sided personal view of them is given, this will be evidence of unfairness: *Woodgate* v. *Ridout*, 4 Fost. & F. 202. It has been held that the evidence may be declared unfounded, unconscious, or careless, but it must not be stigmatized as willful and malicious, or recklessly false: *Hedley* v. *Barlow*, 4 Id. 224; nor as being unsupported, having no effect, and as being commented upon with cutting severity: *Roberts* v. *Brown*, 10 Bing. 519; 4 Moore & S. 407. A publication denouncing the verdict of a jury as infamous, and declaring that it was impossible to express sufficient contempt for the jurors who had thus offended public opinion, and done injustice to their oaths, is libelous, and not protected as privileged: *Byres* v. *Martin*, 2 Col. 605.

The recent English decisions incline to be lenient with the press when pursued for alleged libelous comments or statements either upon or concerning judicial proceedings, and the persons affected by them, or upon other matters in which the public has an interest, and concerning which it is admitted that newspapers and public writers have a duty to keep it informed. If the matters under consideration are such as to excite great public interest, and necessarily to arouse a deep conviction in the mind of a writer or publisher that he has a duty to perform in laying bare the facts, and in holding some evil-doer up to public condemnation, the courts will generally excuse his mistake of fact made in good faith, or his intemperance of expression generated by natural aversion to what he believes to be a wrong that ought to be exposed and thereby suppressed. Speaking of alleged libelous comments upon a plaintiff who pretended to unusual skill and knowledge respecting the treatment of disease, Cockburn, C. J., in charging the jury, said: "Here is a man bringing forward what professes to be a scientific book, inviting the public to come and be treated for the saddest disease that is known among us. If he does that, he challenges public criticism, and then if a public writer of competent knowledge deals with his theory, and, looking upon all the circumstances, using that forbearance and moderation, and exercising that temperate judgment which every man is bound to exercise who not only criticises the conduct of another, but proceeds to impute to him evil motives and designs, — if the public writer executes his task with that spirit, goes beyond the limits to which a more sound knowledge of the facts would have warranted him in going, he is nevertheless privileged; the occasion is a privileged one, and if the privilege is exercised honestly and faithfully, and with reasonable regard to what truth and justice require, he is exempt from the consequences if he shall have gone beyond what the limits of truth more carefully ascertained would have justified. It is, therefore, not necessary that justification should, to all intents and purposes, be made out if you think the defendant or the party who wrote this article for which the defendant is made liable was, in the reasonable and honest exercise of his duty as a public writer, warranted by the circumstances in drawing the inferences which he has drawn as to the motives and conduct of the plaintiff, although it may turn out that he has not been to the fullest extent accurate": *Hunter* v. *Sharpe*, 4 Fost. & F. 983; 15 L. T., N. S., 421.

In the case of *Risk Allah Bey* v. *Whitehurst*, 18 L. T. 515, the defendant was the publisher of the Daily Telegraph, and the matters complained of as libelous were a leading article and parts of letters from a correspondent of that periodical at Brussels relative to the trial of the plaintiff for the murder of his ward. The letters, so far as complained of, commenced by suggesting that the defendant in the criminal prosecution "has certainly to meet a

formidable array of charges"; they next detail the circumstances accompanying the murder, and call attention to various supposed facts tending to inculpate the accused, and to other facts, some of which tended to support and others to refute the assumption that his ward's death could have been due to suicide; the speech of the counsel for the prosecution and that of the counsel for the accused were referred to at considerable length, some parts of the latter being given *verbatim*, though that part of it detailing the facts was omitted. The letters written after the accused had been acquitted restated the case against him with very great force and dramatic power, and from them no other conclusion could fairly be drawn than that it was not the exculpatory evidence, but the prosperity, skill, and power of the prisoner and his counsel which averted a conviction. In commenting on these letters to the jury, Cockburn, C. J., called attention to the fact that they were written in a foreign country, where the tendency was to present judicial proceedings in a sensational and dramatic form, and exhibited his preference for the more prosy and less theatrical modes employed by writers in England; he admitted that the writer must have felt that the evidence bore strongly against the accused, and that he had no right to give the impression which had been formed in his own mind. "He is not called upon to give an opinion. He is not called upon to tell the impression produced upon a court of justice, but he takes upon himself to say that there is no prohibition against any one at this time to say that the man was a villain. You can judge how far that is consistent with a fair report of the proceedings. I am bound to tell you it is not. It is beyond the province of a reporter or publisher to go beyond reporting, and say of a person on his trial, 'that man is a villain.'" The chief justice concluded that portion of his charge having reference to the letters as follows: "Gentlemen, while on the one hand we uphold the liberty of the press, and especially in the matter of reporting the proceedings of our courts of justice, which it is to the interest of the whole public should be made known as widely as possible, we must take care those who exercise that all-important function shall act under a due sense of the duties they have to perform, and the responsibility under which they exercise those functions; and if you are of opinion that, looking at the whole of these communications, they do not contain a fair, honest, and faithful representation of what passed under the proceedings of that trial, but that, yielding to the impressions of the moment, or with the idea of making his articles as taking, as attractive, and effective as possible, the writer has gone beyond the legitimate bounds of privilege, and that on these considerations he has stated that which is unfair and prejudicial to the man about whom he was writing, — if you think there are passages where the reporter is merely repeating his own statements, — you are bound to say so by your verdict. You will have to say what the damages are. The issue presented to you is, whether this was a fair report of the proceedings of a court of justice, or whether it is a garbled, prejudiced, and passionate description of what took place."

Proceeding with his charge in the same case, the chief justice next referred to the editorial article which had been published by the defendant in his journal, and to the claim made by the one side that it, in effect, merely suggested that the plaintiff had been a fortunate man to have had his innocence affirmed by the jury, and on the other hand, as, in substance, stating that he was "a fortunate man to have escaped, not because the circumstances against him had been cleared up at the last moment, but because he had been a lucky man, or had the advantage of an ingenious advocate, or had the

good fortune to be tried by a stupid jury"; and the court said that if the latter meaning was properly attributable to the article, it would be a "publication of which an innocent man would have just ground of complaint." The judge then concluded as follows: "Now, gentlemen, it is for you, in the first place, to form your own judgment upon what the effect — the intended effect — of that article was. Is it simply to say, as the defendant puts it, that, under all the circumstances, Risk Allah was innocent, but that appearances have been against him, and that his innocence had been proved? Or is it intended to suggest that, although Risk Allah had been pronounced not guilty by the verdict of the jury, given with the entire approbation of the court, it was only from the skillfulness of the defense and his own good fortune that he escaped conviction? That is the question for you, in the first instance. If you are of the opinion that the writer, upon reflection, rejoiced that his innocence was proved over all appearances of guilt, that is a thing nobody can complain of; but if you are of opinion that, either directly or indirectly, he asserts that the guilt of the man was confirmed, then you will have to consider how far he was justified by the privileges the law gives to those who discuss matters of public interest. There is no difference here about law. It is agreed by counsel on both sides. The discussion of public questions is so important to the well-being of society, and especially the discussion of what takes places in courts of justice and the results of trials, that those who in the public press of this country discuss those matters have a decided right and privilege to treat upon the administration of justice; and even if a public writer in the press should write that which turns out not to be founded upon the inferences he draws, and is unable to justify the conclusion he has arrived at, yet if he has acted in good faith in the discharge of his duty, bringing to it the amount of care, reason, and judgment which a man who takes it upon himself to discuss public questions is bound to bring, so that the jury is of opinion that he has acted reasonably and properly, he will be protected by that privilege, although he may turn out to have been in error. Therefore, it is for you to consider whether the circumstances were such as to warrant that article, even upon the assumption that they did intend to impute to Risk Allah the crime of murder, even after his recent acquittal. In considering this you must take all the circumstances of the case, and see what tells in his favor and what tells against him, and then see how far the writer, in the calm, fair, and dispassionate exercise of the judgment which he was bound to bring to the consideration of such a case, was justified in making these imputations. I can well understand that at the first outset any one who was made cognizant of the facts bearing against Risk Allah, as stated in the *acte a'accusation*, would have thought him guilty; and if the case stopped there I should not have blamed any one who, in discussing that matter, had come to that conclusion. But the question is, whether they could bring an accusation of guilt against him when all the facts were heard. It is for you to judge whether Risk Allah was innocent of the charge, or whether any man, in the exercise of sound judgment, and desirous of doing justice, could come to any other conclusion. I quite agree that if, by some oversight or want of firmness on the part of the judge or jury, a great criminal escapes, and by a miscarriage of justice a scandal is brought on its administration, and the criminal is let loose on society, rehabilitated and let loose when he ought to be suffering punishment, — in such a case a public writer would be doing no more than his duty in coming forward to remonstrate with the tribunal through whose want of firmness the man has been acquitted. If that is done through that fair and reasonable exercise of judgment which the case

demands, no jury ought to visit a public writer with damages, because he has fairly and conscientiously discharged a public duty. On the other hand, if you think there has been rashness and recklessness in quarreling with the verdict of acquittal, which has declared the man to be innocent, and especially under a criminal prosecution, your verdict will be based on those considerations. You will take all these things into your consideration, and you must also take into consideration that human judgment is liable to error, and must ask yourselves whether there was any intention to single out Risk Allah for animadversion on the part of the writer."

At the common law, the defense that a defamatory publication was true was admissible as a justification only in civil actions: 2 Bishop's Crim. Law, sec. 918. In the majority of the United States, either the constitutional or the statutory law provides, in substance, that "the truth may be given in evidence to be a defense only when the further fact appears that the publication was made with good motives, and for justifiable ends. In some of our states, the statute is even more favorable to defendants than this": Id., sec. 920; *Castle* v. *Houston*, 19 Kan. 417. Even in the absence of these statutes, the truth was sometimes received in evidence in criminal prosecutions. Thus in *Commonwealth* v. *Clap*, 4 Mass. 163, 3 Am. Dec. 212, Chief Justice Parsons said: "Although the truth of words is no justification, in a criminal prosecution, for a libel, yet the defendant may repel the charge by proving that the publication was for a justifiable purpose, and not malicious, nor with intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame." Hence when one is an officer, or a candidate for office, a newspaper, for the purpose of showing whether he is fit for such office, may publish of him that which is clearly defamatory, and, in justification of what it did, prove the truth of the charges made by it, even though there is no statute conceding this defense in express terms: *Commonwealth* v. *Clap*, *supra*; *Commonwealth* v. *Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Commonwealth* v. *Morris*, 1 Va. Cas. 175; 5 Am. Dec. 515; *State* v. *Burnham*, 9 N. H. 34; 31 Am. Dec. 217.

In many instances, publications may be both libelous and true, and yet made for unworthy motives. One might have the public thus kept in remembrance of an early indiscretion which he had long since repented, or advised of some physical defect or deformity for which he is in no wise blamable. In these instances, as the publication is true, he is not permitted to maintain any civil action therefor. If the publication was not made for justifiable ends, the publisher is guilty of a crime, for which he may be prosecuted and convicted; but he is not answerable in damages to the person libeled, however malicious or otherwise unworthy his motive may be: *Castle* v. *Houston*, 19 Kan. 417; *Perry* v. *Man*, 1 R. I. 263; *Rayne* v. *Taylor*, 14 La. Ann. 406; *Baum* v. *Clause*, 5 Hill, 196; *Heilman* v. *Shanklin*, 60 Ind. 441; *Sullings* v. *Shakespeare*, 46 Mich. 408; *Foss* v. *Hildreth*, 10 Allen, 76. In Massachusetts, in 1855, the law was changed by a statute which, in effect, prohibits a recovery of damages for a defamatory publication, though proved to be true, "unless malicious intention shall be proved." Under this statute, criminal prosecutions and civil actions are placed on a common ground. In either, if the defendant shows that the matters published were true, he makes out a complete defense, unless the government in the one case, or the plaintiff in the other, shows affirmatively "that the publication was made with malicious intention": *Perry* v. *Porter*, 124 Mass. 338. This

statute, therefore, shifts the burden of proof in criminal prosecutions. But for it, the defendant must assume the burden of establishing, in addition to the truth of the publication, that it "was published for good motives and justifiable ends": *Commonwealth* v. *Bonner*, 9 Met. 410.

The presumption respecting a libelous charge, in the absence of any statute upon the subject, is, that it is false, and without sufficient excuse. A defendant, whether in a civil action or a criminal prosecution, who desires to urge that what he said was true, must, therefore, assume the burden of establishing it by competent and sufficient evidence: *Russell* v. *Anthony*, 21 Kan. 450.

Whether one, knowing or suspecting that a libel is about to be published, to the injury of his property or his reputation, is entitled to any preventive relief, is a question upon which the adjudged cases are unsatisfactory and conflicting. The decision in *Prudential L. I. A.* v. *Knott*, 23 Week. Rep. 249, L. R. 10 Ch. App. 142, 44 L. J. Ch., 31 L. T. 866, 7 Chic. L. N. 405, seemed to settle the question in England, and to establish the rule that in no case would an injunction be issued to restrain the publication of a libel, whether against the person or the property of the complainant. While that decision has not, as far as we can ascertain, been overruled, it has been so frequently disregarded, and so many adjudications have been made at variance with it, that it can no longer be regarded as correctly stating the law. If a libel is one containing false and defamatory statements respecting the complainant's property or business, and is calculated to injure him in his property or business, the more recent as well as some of the earlier English decisions indicate that an injunction may properly issue: *Hayward* v. *Hayward*, 34 Ch. D. 198; *Quartz Hill C. G. M. Co.* v. *Beall*, 20 L. J. Ch. Div. 501; 51 L. J. Ch. 874; 46 L. T. 746; *Saxby* v. *Esterbrook*, L. R. 3 Com. P. Div. 339; 27 Week. Rep. 188; *Thorley's Cattle Food Co.* v. *Massam*, L. R. 14 Ch. Div. 763; 42 L. T., N. S., 851; 28 Week. Rep. 966; *Thomas* v. *Williams*, L. R. 14 Ch. Div. 864; 49 L. J. Ch. 605; 43 L. T. 91; 28 Week. Rep. 983. The decisions upon this subject by the American courts are infrequent, and are chiefly characterized by an attempt to follow the adjudications upon the same subject in England; and in this attempt the American courts have necessarily reached conclusions as irreconcilable as those which they sought to follow: *Singer Mfg. Co.* v. *Domestic Co.*, 49 Ga. 70; *Bell* v. *Singer Mfg. Co.*, 65 Id. 452; High on Injunctions, sec. 1015. With respect to libels which reflect upon the reputation of the person libeled, and which do not directly otherwise injure his person or property, no attempt, so far as we are aware, has ever been made to prevent their publication by injunction, and hence no reference can be given to any decisions, whether English or American, upon that topic.

BEDELL *v.* BERKEY.

[76 MICHIGAN, 435.]

CONTRIBUTORY NEGLIGENCE. — A STRANGER COMING ON BUSINESS OR OTHERWISE UPON THE PREMISES OF ANOTHER has no right to choose for himself his means of ingress and egress, and has no right to determine where bulky articles shall be unloaded, or to unload them without inquiry or notice, and if in so doing he receives an injury, he cannot recover.

CONTRIBUTORY NEGLIGENCE. — PERSONS WHO STRAY ABOUT OTHER PEOPLE'S PREMISES at their own will must look out for their safety in dangerous and unsafe places, or themselves suffer the consequences.

CONTRIBUTORY NEGLIGENCE. — No one has any right to endanger himself, or to disturb other people's arrangements on their premises, by moving around in the dark in a strange room, into which he has entered of his own accord and without direction, and if he receives an injury in so doing, he is himself responsible for it.

JURY AND JURIES — RIGHT TO VIEW PREMISES. — Testimony of localities can generally be better understood by views and observation than by word of mouth, and changes can just as well be explained after such view; therefore, the jury are generally entitled to view premises, where an injury is received, or to use photographs thereof produced in evidence.

Butterfield and Keeney, for the appellant.

J. C. Fitz Gerald, F. A. Stace, and Charles Chandler, for the plaintiff.

CAMPBELL, J. On March 21, 1887, at about four o'clock in the afternoon, plaintiff fell down an elevator-shaft, from the ground floor to the bottom, in a building partly occupied by defendant for making wooden tripods. The declaration relies as grounds for the charge of negligence on the alleged failure to have the elevator-shaft guarded in any way, and the darkness of the room upon which it opened. Plaintiff was averred to have been unacquainted with the premises, and to have been there for the lawful purpose of transacting business, at defendant's request, and to have been exercising due care.

The defendant's testimony indicated that the elevator had proper doors, and was not left open or unguarded. It also incated that the room was not without sufficient light, and that plaintiff had no business where he was, and exercised no caution, but was hurt by his own heedlessness or fault. It was claimed on the trial that plaintiff's own testimony made out no cause of action, and as this question lies at the threshold of the case, it requires attention.

The plaintiff's statement is, in substance, that he had held some interviews with defendant concerning the business of

making and finishing tripods. The building in which the work was done had been partly occupied for defendant's work, and partly by a company making felt goods, who had recently quit work there, and removed most of their stuff. This building fronted westward on Canal Street, in Grand Rapids, and at the east end of the building was an alley in the rear. There was a basement, mostly underground, and defendant occupied a part of the first floor above the basement, and part of the upper stories, including the fourth. A driveway passed along the south side of the building from Canal Street to the alley. The alley was not open beyond the north side of the building. The business office was on the ground-floor on the Canal street front. On the alley in the rear, this floor was reached by a platform about four feet above the ground, with an open front to let light into the basement. This floor was divided by east and west walls into three sections, each twenty-five feet wide. Each of these sections had a door, and a window on each side of it, opening over the rear platform, the windows being four by nine feet, and the doors double, each leaf being two and a half by eight and a half feet. The elevator in question was in the wall between the middle and north sections, opening on each, being about nine feet from the rear of the building, and in size about seven feet two inches by five feet seven inches, thus projecting into each section about three feet seven inches. It had double doors on each side, but there was a dispute whether those on the middle-section side were in place. The shaft was lighted by a window reaching across the projection into the middle section. The doors opening on the rear platform each had two lights, of twenty by thirty-one inches, and two transom lights above them, of twenty-seven by twenty-eight inches. At the time of the accident, the elevator in the middle section opened into a small room partitioned off by boards, and called a storm-room, designed to keep the cold air from the rest of the section when the rear door was open. This storm partition included the rear door and north window of the middle section up to the transom, and ran to the west side of the elevator, where a sliding door gave access from the storm-room to the rest of that section.

In one or more instances plaintiff had gone up in the elevator, entering it from the north side. His declaration claims that he never was in the room on which it opened on the other side, and so he swears. The explanation he gives of entering it on the occasion in question is this: While in the office, talk-

ing with defendant about the sanding and finishing of the rods or poles of which the tripods were made, plaintiff told Mr. Berkey that he knew of a machine formerly used by the Bissell Carpet Sweeper Company, which he thought would do the work faster. Defendant, as plaintiff swears, asked plaintiff if he could get the machine, and plaintiff said he thought he could. Defendant asked him if he could get a team and go and get the machine for him, and he said he would, and did so. The machine was about seven feet long and five feet wide, called a "sander."

Plaintiff states further that he had the sander taken by a team, and that the teamster took it in by the side passage into the alley, and opposite the north door; that plaintiff, coming a little while after, went by the same way, and tried to open the north door, but found it fastened. He then went to the middle door, and opened it, and when he closed it he found himself in what he calls a darkish room, not altogether dark. He says: "I saw a little light shining through here, ahead of me, just a dim light, and I walked up here, saw this light, took it to be an opening between the door, between the two sections, the middle and the north sections. I turned to my right, and, as I supposed, was going through into this department through a door, and I stepped into a hole."

After he fell in, he looked up and saw the elevator was standing at the third floor above.

Plaintiff was allowed, against objection, to show that a few weeks after the accident he went into this same storm-room, and to describe various things he then found which obstructed the light, and which he claimed were there when he was hurt. It appears, however, from his minute description, that he had no trouble in seeing and describing the construction and contents of the room, and all its means of ingress and egress. There was nothing to cut off the light from the outer door, although some rods were so piled as to be across part of the window. The testimony is full to the point that it was used as a packing and marking room for shipment of parcels.

Taking plaintiff's own testimony as a correct version of the disputed facts, he had not ascertained and did not promise to a certainty that the sander could be obtained at all, or when it would be obtained, or when it could or would be brought if so obtained, or where it would be wanted or placed. He gave no notice to defendant to be ready to receive it, and gave no notice of its arrival when it came. He had never been

informed that there was, and there was not in fact, any door of communication between the north and middle sections in that part of the building; and he had no reason for assuming that the north section was the proper place to put the machine, or that the door of that section was the proper place to receive it. From his account of his visits to the place to confer with defendant, it is apparent that he was very heedless and unobserving of his surroundings, and knew very little more of them than if he had never seen them. He did know where the office was, and had, when visiting the building, entered it by the front, and not by the rear.

It is no more than plain common sense, that a stranger who comes on business or otherwise has no right to choose for himself his means of ingress and egress, and has no right to determine where bulky articles shall be unloaded, or to unload them without inquiry and notice. It was plaintiff's business to go to the office and find out what was to be done with the machine, as well as to enable defendant to take his own measures and use his own men to unload and place it. According to his own story, he knew nothing about the uses or condition of the rear part of the middle section. It had never been brought to his attention as a place where he could properly enter the building, and defendant owed him no duty on the subject. There are always places in factories which, whether generally safe or not, are liable to be unsafe at times for any one who is not acquainted with them; and all persons who stray about other people's premises at their own will must look out for their own safety in such places.

As the time when plaintiff went into the storm-room was at least about two hours before sunset, and the room, which was a very small one, had lights which, whether clean or dirty, occupied a large share of the rear end, and he subsequently found them to give light enough to see all that was important to be seen, and as he says that on this occasion he saw the lights in the elevator-shaft immediately after entering the door, when it was, as he says, some seven feet away, it was his business, if he found it obscure, to wait until his eyes got accustomed to the light before moving round at hap-hazard, without using any care whatever to know where he was going. No one has any right to endanger himself, or to disturb other people's arrangements, by moving round in the dark—if it is dark—in a strange room, into which he has entered of his own accord and without direction. If, instead of hurting himself, he had

injured or destroyed some fragile and valuable article left there, he would have found no reasonable excuse for his trespass. He is in no better position because he was seriously hurt than if he had hurt somebody or something else. He is himself responsible for his own misfortune, and made out no case for redress.

As we can see no ground on which plaintiff could recover in any event, we do not think it worth while to discuss the other errors alleged. There was no good reason, that we can see, why the jury should not have seen the premises, or why the photographs should have been excluded, that should not have equally shut out a large portion of plaintiff's testimony of conditions not contemporaneous. Testimony of localities can generally be better understood by views and observation than by word of mouth, and changes can just as well be explained in the one case as in the other. The court also refused some requests concerning reciprocal rights and duties, and the effect of plaintiff's negligence, which should have been given. In actions for personal injuries, juries require very pointed and well-defined instructions to keep them from acting on vague ideas. There was also some hearsay testimony improperly admitted. And the medical testimony was more than usually hypothetical. But as we think the case should not have been left to the jury, there would be no profit in discussing these questions.

Judgment should be reversed, with costs of both courts.

NEGLIGENCE. — One lawfully driving upon the premises of another must leave them by the usual, ordinary, and customary way in which such premises are and have been departed from: *Armstrong* v. *Medbury*, 67 Mich. 250; 11 Am. St. Rep. 585, and note 588, with reference to the inability of a trespasser or mere licensee to recover for injuries sustained by reason of dangerous contrivances upon premises of another. The owner of premises is not liable in damages for an injury sustained by another, although lawfully upon his property, in the absence of evidence as to the direct cause of the injury: *Huey* v. *Gahlenbeck*, 121 Pa. St. 238; 6 Am. St. Rep. 790, and note 792–795, as to the presumption of negligence when injuries are sustained, and there is no evidence as to who was in fault. A land-owner is not ordinarily under obligation to strangers to put guards around excavations made by him upon his own premises: *Overholt* v. *Vieths*, 93 Mo. 422; 3 Am. St. Rep. 557; *Sweeny* v. *Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644, and note; *Evansville etc. R. R. Co.* v. *Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *Gillespie* v. *McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365; *Illinois Cent. R. R. Co.* v. *Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; and one owes no duty to a mere trespasser to keep his premises safe: *Parker* v. *Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Pittsburgh etc. R'y Co.* v. *Bingham*, 29 Ohio St. 364; 23 Am. Rep. 751, and cases cited in foot-note; *Larmore* v. *Crown Point I. Co.*, 101

N. Y. 201; 54 Am. Rep. 718, and note 722; and for the same reason it has been held that one in the vehicle of another, without his knowledge or consent, cannot recover for injury by the owner's careless driving: *Siegrist* v. *Arnot*, 86 Mo. 200; 56 Am. Rep. 425; compare *Severy* v. *Nickerson*, 120 Mass. 306; 21 Am. Rep. 514, and case in foot-note.

But the owner of lands is liable in damages to one who, using due care, comes thereon at the invitation or inducement, express or implied, of such owner, on any business to be transacted with or permitted by him, for injuries sustained by reason of the unsafe condition of the premises, known to him and negligently suffered to exist, and of which the injured party was ignorant: *Donaldson* v. *Wilson*, 60 Mich. 86; 1 Am. St. Rep. 487, and numerous cases of these series collected in note 489, 490, as to when a landowner is liable for injuries to individuals coming upon his premises. Compare *Atlanta etc. Mills* v. *Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244, and note.

But every person, whether a mere licensee, or upon invitation, express or implied, seeking access to the premises of another, must use ordinary care: *Parker* v. *Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262, and cases cited in foot-note.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

SWEET *v.* MORRISON.

[116 NEW YORK, 19.]

ARBITRATION. — AGREEMENT BY A CONTRACTOR AND A SUBCONTRACTOR THAT ANY DISPUTE THAT SHOULD ARISE between them should be decided by the chief engineer of the railway corporation for which the work was to be done, is binding on both parties. It is, in one sense, more obligatory than an ordinary submission to arbitration, because, being on consideration, it is not revocable, and no obligation to pay arises until the estimate is made by the chief engineer.

ARBITRATOR, DUTIES OF A CHIEF ENGINEER AS. — If parties contracting to do work upon a railway agree that the amount which is to become due from one to the other, and all disputes arising on the contract, shall be decided by the chief engineer of the railroad corporation, this agreement must be construed in the light of surrounding circumstances, and if the one to whose decision they thus refer is the chief engineer of a road extending from the Missouri River to the Pacific Ocean, they must be understood as intending that he should obtain his information in the usual way from his subordinates, and it is therefore no objection to a report made by him that he did not personally make the measurements and estimates upon which such report was based.

ARBITRATION.—CHIEF ENGINEER OF THE RAILWAY CORPORATION, TO WHOSE ARBITRAMENT the contracting parties have left the amount which is to become due them, may refuse to hear evidence, and rely solely upon the estimates and reports of his subordinates.

AN AWARD WILL NOT BE SET ASIDE FOR A MISTAKE WHICH DOES NOT APPEAR on its face, or in some paper delivered with it.

ONE SEEKING TO SET AN AWARD ASIDE FOR MISTAKE must show from the award itself that but for the mistake the award would have been different.

AWARD. — THE ESTIMATE OF THE CHIEF ENGINEER OF A RAILROAD CORPORATION, TO WHOSE DETERMINATION the contracting parties have submitted the amount which shall become due under a contract, is conclusive,

in the absence of corruption, bad faith, or misconduct on his part, or palpable mistake appearing on the face of the estimate, and neither party will be allowed to prove that he decided erroneously as to the law or the facts.

ACTION to recover a balance alleged to be due plaintiffs under a contract between them and the defendants. In September, 1871, the defendants, comprising the firm of Payson, Canda, & Co., contracted with the Northern Pacific Railroad Company to furnish the materials and to build the Dakota division of its road, from the Missouri River to the Red River of the North, above two hundred miles in length. The contract declared that the work should conform to specifications annexed, and to the instructions and directions of the chief engineer of the company. The following provisions of the contract are necessary to the better understanding of the opinion of the court: "And it is further mutually agreed, with a view of preventing disputes and misunderstandings, and for the speedy adjustment of such as may occur, that the engineer-in-chief shall determine the amount and quantity of work herein contracted to be done, and shall decide every question which can or may arise relative to the execution of the work under this contract on the part of said contractors, and his decision shall be final and conclusive." "In case any difference of opinion shall arise between the parties hereto as to the construction of this contract, and the true intent and meaning thereof, and of the parties in forming the same, such difference shall be considered and decided by the engineer-in-chief. And the said parties hereto do hereby submit all and singular the premises to the award, arbitrament, and decision of the engineer-in-chief, and do hereby agree the same shall be final and conclusive between them to all intents and purposes." In March, 1872, the plaintiffs, who formed the firm of E. Sweet, Jr., & Co., contracted in writing with Payson, Canda, & Co., to erect bridges, trestle and other timber work, required by the contract entered into between defendants and the Northern Pacific Railroad Company. This contract of plaintiffs they also agreed to perform to the satisfaction and acceptance of the chief engineer of the railroad company, or his assistants. Plaintiffs' agreement also contained the following provisions: "It is mutually agreed between said parties that, to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the

chief engineer of the Northern Pacific railroad shall be, and hereby is, made an umpire to decide all matters arising or growing out of this contract between them." "It is further mutually agreed and expressly understood that the decision of said chief engineer on any point or matter touching this agreement shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy in law or otherwise, under this contract, or arising out of the same." "And the said first party, in consideration of the fulfillment and performance of all the stipulations contained in this contract, to be by said second party fulfilled and performed, and whenever said work shall have been, in the opinion of the chief engineer, completely finished in every respect and performed agreeably to the various stipulations and specifications of this agreement, and said chief engineer shall have furnished to said first party a certificate of the fact under his hand, together with his estimate of the quantity of the various kinds of work done by said second party under this agreement (which estimate shall be final and conclusive between the parties hereto), will pay to said second party the sum or sums which shall be due said second party on a final settlement, within ten days after said certificate and estimates shall have been furnished by said chief engineer, and said first party shall have been paid for the work embraced in said estimate by the Northern Pacific Railroad Company, in accordance with their contract, the sum which may be due under this contract, agreeably to said estimate, at the following rates and prices." "It is further understood and agreed by the parties hereto that this contract is made upon the same terms and conditions and to conform in said respects to a certain agreement as made by and between the first party and the Northern Pacific Railroad Company, and designed to be copied substantially from said last-named contract as far as it may apply to the same." The plaintiffs, having completed the work provided for by their contract, brought an action to recover the amount claimed to be due therefor. The trial court found "that the chief engineer of the railroad company gave estimates of and certificates purporting to be for all the work performed by the plaintiffs and Payson, Canda, & Co."; that the chief engineer, in ascertaining the quantities in his final estimates, did not personally measure the work, but acted upon information furnished him by persons other than the plaintiffs; that the plaintiffs, when

the final estimate was signed, asked leave to show, by the "sworn testimony of a competent witness," the true quantities of plaintiffs' work, and that the chief engineer declined to hear such witness, or to permit plaintiffs to contradict the statement made to him concerning the work by his subordinate engineers. The court was therefore of the opinion that no binding award had been made, and that plaintiffs were at liberty to show, if they could, that there was a mistake made in the quantity of material furnished or work done in the estimate or accounts. A reference was then made to take an account between plaintiffs and defendants. An interlocutory decree having been entered, the cause was directed to stand over until the referee should report. The referee reported that the materials furnished and the work done by plaintiffs amounted to $117,297.73, and that the payments and credits thereon were $90,671.94, and that there was due from defendants to plaintiffs $26,625.79. This last-named sum represented the difference between the amount found due by the referee and the amount of the chief engineer's award, there being no dispute respecting the credits or payments. In the complaint, plaintiffs stated that the underestimate amounted to $15,194.54. The plaintiffs were also allowed $13,194.54 for interest. Upon the final hearing, the trial court adopted and approved the findings of the referee, and directed judgment accordingly.

Edward Winslow Paige and Henry Brodhead, for the appellants.

John Van Voorhis and W. W. Niles, for the respondents.

VANN, J, The person selected by the parties to make the estimate was in the employ of neither, yet, as chief engineer of the railroad company, he sustained such a relation to both as to make it the interest of each that his estimate as to the materials furnished and work done by the plaintiffs should be as large as possible, for it determined the amount of the plaintiffs' compensation as subcontractors and of the defendant's profits thereon as contractors. This case, therefore, is unlike those, so frequently arising, in which the certificate or estimate is required from an architect or engineer in the employment of one of the parties. In that class of cases, the danger that the person acting as an arbitrator might favor his employers is obvious. While neither natural nor legal disabilities hinder a person from being an arbitrator, provided the

fact is known to the parties at the time of the submission, still, as he is the agent of both parties alike, and impartiality is the fundamental requisite, the courts closely scrutinize the action of an arbitrator whose relation to one of the parties was such as to naturally influence the judgment even of an honest man: Morse on Arbitration and Award, 99; Russell on Arbitration 105.

In this case, however, there was no reason why the person selected should not be wholly disinterested and impartial. The parties stood upon an equal footing, their contract was without legal objection, and the arbitration clause is as binding and should be enforced the same as any other provision. In one sense, as was said in a case somewhat analogous, the submission to the determination of the engineer is more obligatory than any ordinary submission to arbitration, inasmuch as, being upon consideration, it is not revocable, and the obligation upon the defendants to pay did not, by the terms of the contract, arise until the estimate was made by the engineer: *Herrick* v. *Vermont C. R'y Co.*, 27 Vt. 673, 679. A valid award or estimate operates as a final and conclusive judgment, and however disappointing it may be, the parties must abide by it: Id.; *Perkins* v. *Giles*, 50 N. Y. 228; *Fudickar* v. *Guardian Mutual Life Ins. Co.*, 62 Id. 392; *Kidwell* v. *Baltimore etc. R. R. Co.*, 11 Gratt. 676; *O'Reilly* v. *Kerns*, 52 Pa. St. 214; *Vanderwerker* v. *Vermont etc. R. R. Co.*, 27 Vt. 130; *Ranger* v. *Great Western R'y Co.*, 5 H. L. Cas. 71; 2 Wood on Railroads, 995; 1 Redfield on Railways, 438.

The estimate made by the chief engineer should not, therefore, be set aside or disregarded unless some good reason is shown for such action. The trial court, without deciding that there was any error in the estimate, adjudged, by its interlocutory decree, that if, upon the reference ordered, any error should appear in the estimate, it should be corrected, and that the party in whose favor a balance then appeared should recover the same from the other. The only reason appearing in the findings or suggested by the evidence for thus disturbing that which the parties had expressly stipulated should be final is, that the chief engineer did not personally measure the work, and that when the final estimate was about to be signed he refused to allow the plaintiffs to call a witness to contradict the statements already made to him by the subordinate engineers. This involves an inquiry into the nature of the power intrusted to the chief engineer. Was he an arbi-

trator, as that term is understood at common law? Or was it his duty, in estimating quantities, to simply make a summary computation, as held by the learned general term? The answer to this question must be found in the contract, which is both the source and limit of the power under consideration. The contract, however, is to be construed in the light of the surrounding circumstances, and in connection with the agreement with the railroad company, and the actual intention of the parties thus ascertained. The power in question was confided to a man, who, as engineer-in-chief, was building a railroad extending from the Missouri River to the Pacific Ocean. The single division of the road to which the contracts related was more than two hundred miles long, and it was to be completed between the 29th of September, 1871, and the 1st of July, 1872. Could it have been within the contemplation of the parties that the head of so great an enterprise should make the measurements himself, or even personally superintend them when made by others? The plaintiffs' contract provided that the square timber and plank in structures and flattened timber in structure, as well as for all pile and trestle and all other timber structures, required on the road-bed of the Dakota division, "should be paid for at so much per thousand feet board measure"; piling at a certain price "per lineal foot of piles driven"; and "all iron used in above work, at ten cents per pound." The bridges were to be paid for at so much per lineal foot, with an increase of price as the spans increased in length.

Considering the extent of the railroad, the time provided for its completion, the details and complications in the measurements and the nature of the duties of the chief engineer as implied from his position, even if it would be possible for him to give the requisite personal attention to the subject, it would be unreasonable to expect it. As said by the court in the Herrick case, *supra:* "When we come to know that practically the chief engineer never does and never can make these estimates, or even verify those made by others, that the thing is altogether impracticable, we must conclude that the parties had reference to something which was usual, or at least possible, in such cases." It was accordingly held that an estimate by the assistant engineer was sufficient in that case. When the chief engineer was constituted the sole judge between the parties of the quantity of work done and materials furnished by the plaintiffs, they did not provide that he was to measure,

but that he was to estimate. In *McMahon* v. *New York and Erie R. R. Co.*, 20 N. Y. 463, the contract provided that the measurements were to be made by the engineer; but the parties did not require that in this case, where compliance would have been virtually impossible. They evidently meant that he was to act in some way that was possible and practicable, as otherwise they could not expect him to act at all; for neither of them had any control over him. But how was he to make the estimate if not from personal measurement or observation? Upon what was he to base it? How was he to get at the facts? The contract, interpreted in the light of the surrounding circumstances, suggests the answer that he was necessarily to rely upon the reports of his subordinates. No other way was practicable for estimating so great a work, extending over so many miles of territory. Even if one man could do it, the head of the engineering department that was building a railroad across a continent would not be selected for the purpose. The position of the chief engineer made him conversant with the general facts, and gave him a thorough knowledge of the engineers under his control. He was in a situation to exercise his judgment upon the reliability of their reports, and could direct others to revise their measurements if he deemed it necessary. The same means that he employed to protect the railroad in its payments to the defendants were apparently regarded as sufficient to protect the parties as between each other. The evidence shows that the estimates were made from actual surveys and measurements by engineers of the railroad company in the presence of the plaintiffs' foreman. After the work was finished, one of the plaintiffs, with one of the defendants, met the chief engineer and the division engineer, and together they made up an estimate which, according to the deposition of a witness read in evidence by the plaintiffs, and not contradicted, so far as appears, was agreed upon by all, after certain concessions had been made. This estimate included everything, except certain iron and lumber then on hand, which it was agreed should be estimated and added to make it final.

It is to be observed that the plaintiffs, when they learned that the estimate was about to be signed, made no objection to the action of the chief engineer because he had not personally measured the work; nor did they request him to measure it or to cause new measurements to be made. They did ask him, however, to take the evidence of their foreman as to the true

quantity of work. He replied that he must rely upon the reports of his subordinates as to the quantity, and that he could not take the testimony of the contractors or their employees.

Was it the duty of the chief engineer to hear evidence? We have already held that the nature of his trust was such as to permit him to rely upon the reports of his subordinates in making his estimate. The same reasoning which led us to that conclusion applies with equal force as an answer to this question. Did the parties expect him to try a lawsuit? For if the door is opened to admit one witness, why should not all who know anything about the matter be allowed to come in? And what would this involve? The statement introduced in evidence by the plaintiffs upon the trial consists of sixty-five printed pages of items, considerably exceeding one thousand in number. Nearly every item is an aggregation of other items not appearing in the statement. Each states the number of pieces, their designation, size in inches, length in feet and inches, quantity by board measure, kind of timber or material, and in same instances other particulars. This includes but three fourths of plaintiffs' work, as no question was raised in relation to one residency or subdivision. Each item and each subitem might give rise to an issue, and become the subject of controversy. Did the parties expect that a man charged with the responsibility of building a great railroad could stop long enough to enter upon an investigation, through witnesses called and sworn, with such possibilities? To ask this question is to answer it. We think that it was the intention of the parties to clothe the chief engineer with the power of summary computation, based upon his experience in building railroads, his general knowledge of this road, the original surveys, measurements, plans, specifications, and such other *data* as would be presumed to be in his possession, but chiefly upon the reports of the skilled engineers working under him. It thus became his duty to exercise his judgment upon all the facts thus ascertained, and to fairly make the estimate. There was no delegation of authority further than was impliedly authorized by the contract: *Wiberly* v. *Matthews*, 91 N. Y. 648; Billing on Awards, 76, 77.

What was the effect of the estimate made by the chief engineer? The intention of the parties to make it final is evident from the language used in their own agreement, and it is emphasized by the reference to the agreement between the railroad company and the defendants, which contains a pro-

vision making the estimate of the same person conclusive upon the parties to that instrument also. The defendants evidently intended that the work which they had agreed to do for the railroad company, and which they sublet at a profit to the plaintiffs, should be estimated under both contracts by the same person; so that the estimate which was conclusive between the railroad company and themselves should also be conclusive between the plaintiffs and themselves. The plaintiffs, by signing their contract, united with the defendants in the effort to carry this intention into effect. The construction of the contract, its performance, and all matters of difference that might arise in relation thereto, were submitted in advance to the chief engineer, whose decision was made final and conclusive upon both parties, each of whom waived any right of action, suit, or other remedy "in law or otherwise," under or arising out of the contract. Furthermore, it was made a condition precedent to the payment of the plaintiffs that the chief engineer should furnish to the defendants his certificate that the work had been completely finished in every respect, according to the stipulations and specifications, together with his estimate of the quantity of work done, which estimate it was agreed should not only be final and conclusive upon both parties, but it was also fixed upon as the basis to determine the amount due to the plaintiffs. Compliance with this provision thus became a condition precedent to any recovery by the plaintiffs: *Butler* v. *Tucker*, 24 Wend. 447; *Smith* v. *Briggs*, 3 Denio, 73; *Delaware etc. Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250; *United States* v. *Robeson*, 9 Pet. 319; Story's Eq. Jur., sec. 1457 a.

The chief engineer had the general powers and duties of an arbitrator, except as they were expressly or impliedly restricted or increased by the contract of the parties. We have held that they could not have intended that which they knew to be impossible, but, as they agreed that he should be an umpire to decide all matters arising or growing out of the contract, the same effect should be given to his estimate, when made as to the decision of an umpire or arbitrator. No court has any general power of supervision over the awards of arbitrators. There is no claim of fraud, corruption, or bad faith on the part of the chief engineer, and the only misconduct charged against him has already been noticed. It is, however, claimed that he made a mistake in his estimate. The court did not so decide when it made its interlocutory decree,

which is based wholly upon the failure to personally measure and the refusal to hear evidence. It is well settled that while an award may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, still, in general, such mistake, to be available, must appear on the face of the award, or in some paper delivered with it: *Fudickar* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. 392; *Morris Run Coal Co.* v. *Salt Co. of Onondaga*, 58 Id. 667; *Woods* v. *Monell*, 1 Johns. Ch. 502; *Todd* v. *Barlow*, 2 Id. 551.

The party who seeks to set aside an award, upon the ground of mistake, must show from the award itself that but for the mistake the award would have been different: Id. No mistake appears upon the face of the estimate made by the engineer. The alleged error did not appear until after the entry of the interlocutory decree, and at the close of a protracted trial before the referee. The merits of an award, however unreasonable or unjust it may be, cannot be reinvestigated, for otherwise the award, instead of being the end of the litigation, would simply be a useless step in its progress. The parties provided by full and explicit stipulations for a final and conclusive estimate by the chief engineer as an essential prerequisite to any payment by the defendants. Of what value are these carefully drawn provisions, if a mistake is to open the whole matter, and throw it into the courts for re-examination? Is it within human power to precisely compute or exactly estimate a work of such magnitude, and with so many details, without any mistake? Is an error of a few dollars in a hundred thousand to throw open the gates of litigation? If not, why should any error, unless it be so great as to be evidence of fraud, corruption, or bad faith? By what other rule can a mistake be measured so as to establish the standard for interference by the courts?

We regard the estimate of the chief engineer as conclusive, and that, in the absence of proof of corruption, bad faith, or misconduct on his part, or palpable mistake appearing on the face of the estimate, neither party can be allowed to prove that he decided wrong as to the law or facts: *Perkins* v. *Giles*, 50 N. Y. 228.

We do not desire to intimate, however, that he decided wrong in any respect, for the evidence strongly tends to sustain his conclusions, but whether his estimate was right or not, the parties, by their contract, conclusively committed their rights to him, and they must abide the result.

The order of the general term, reversing the judgment of the special term, and ordering a new trial, should be affirmed, and judgment absolute ordered against the plaintiffs in accordance with their stipulation, with costs.

Order affirmed, and judgment accordingly.

ARBITRATION AND AWARD. — As to the conclusiveness of an award, and for what reasons only it should be set aside: *Brush* v. *Fisher*, 70 Mich. 469; 14 Am. St. Rep. 510, and particularly note 518; note to *Morville* v. *American Tract Society*, 25 Am. Rep. 46, 47; *Jocelyn* v. *Donnel*, Peck, 274; 14 Am. Dec. 754, 755.

ARBITRATION AND AWARD. — AS TO A CLASSIFICATION of the essentials of a valid award, see note to *Whitcher* v. *Whitcher*, 6 Am. Rep. 498, 499.

ARBITRATION AND AWARD. — Agreements to submit differences to arbitration, when and when not valid: See note to *Campbell* v. *American etc. L. Ins. Co.*, 29 Am. Rep. 602–604.

HUGHES *v.* JONES.

[116 NEW YORK, 67.]

CONTRACTS WITH A LUNATIC, HABITUAL DRUNKARD, OR PERSON OF UNSOUND MIND, MADE AFTER INQUISITION and confirmation thereof, are absolutely void, until by permission of the court he is allowed to assume the control of his property.

CONTRACTS WITH LUNATICS AND OTHER PERSONS OF UNSOUND MIND MADE BEFORE OFFICE FOUND, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence.

PROCEEDINGS IN LUNACY ARE PRESUMPTIVE, BUT NOT CONCLUSIVE, EVIDENCE of want of capacity.

AN INQUISITION WAS AN INQUIRY MADE BY A JURY BEFORE A SHERIFF, coroner, escheator, or other government officer, or by commissioners especially appointed, concerning any matter that entitled the sovereign to the possession of lands or tenements, goods or chattels, by reason of escheat, forfeiture, idiocy, or the like. It was a proceeding in behalf of the public represented by the king.

AN INQUISITION OF LUNACY BINDS THE WHOLE WORLD.

PETITIONER FOR AN INQUISITION OF LUNACY IS NOT A PARTY THERETO IN ANY DIFFERENT SENSE THAN ANY OTHER PERSON, and is not personally estopped by the findings of the jury, except as all the world is estopped. He may, therefore, show that a deed made by the alleged lunatic at any time prior to the filing of the petition was made by him while he was of sound mind.

AN INQUISITION OF LUNACY CANNOT DETERMINE ANYTHING, EXCEPT THE STATUS OF THE ALLEGED LUNATIC. It cannot settle any question of property, and the finding by the jury that a lunatic had, at the time, title to certain lands, is of no force whatever as against one claiming under a prior deed.

ACTION by plaintiff, as heir at law of Richard Hughes, deceased, to set aside a deed executed by the decedent to defendant Jones, and a mortgage executed by defendant Jones to Caroline A. Root, deceased. The deed from Richard Hughes to the defendant Jones was executed on October 7, 1870, and was recorded on the 21st of November following, and purported to be upon the express condition and consideration that the grantee should keep, maintain, and support the grantor and the latter's wife, Margaret, during the period of their natural lives. The plaintiff had recovered a judgment against his father, under which the latter was imprisoned on the 1st of August, 1871. The defendant, to effect the release of the father from such imprisonment, instituted proceedings to have him adjudged a lunatic. The petition stated that said Richard Hughes, who was also known by the name of David Jones, was the father of petitioner, and that he is, and was for the last five years past, a lunatic, and was so far deprived of his reason as to be wholly unfit and unable to govern himself, and that the said David Jones owned at the time he became a lunatic, and in the last two years, certain real property, which was described in the petition, and is the real estate the conveyance of which is the subject of this action. A commission issued on the 18th of October, 1871, and resulted in the inquisition finding "that the said David Jones, *alias* Richard Hughes, is a lunatic, and of unsound mind, and does not enjoy lucid intervals, so that he is incapable of governing himself or of managing his lands, tenements, goods, and chattels, and that he has been in the same state of lunacy for five or six years; that whether the said David Jones, *alias* Richard Hughes, being in that state, has alienated any lands and tenements or not, the jurors aforesaid know not; that the following lands and tenements yet remain to the said David Jones, *alias* Richard Hughes." Among the lands described in the inquisition was the land in controversy in this action. The inquisition was filed on the 13th of November, 1871, with a petition duly filed by the defendant praying that the defendant be appointed a committee of the person and estate of the said David Jones, *alias* Richard Hughes. After due proceedings, an order was made confirming the inquisition, and a committee was appointed to act for Richard Hughes. Afterwards, on motion of the committee, the judgments recovered by plaintiff against his father were set aside, upon the ground that the father was a lunatic, and of unsound mind, when

such judgments were recovered. Upon the trial of the present action, after the inquisition had been offered and received in evidence, the defendant offered evidence tending to show that when Richard Hughes executed the deed in question, he was not a lunatic, and was of sound mind and capable of managing his personal estate. This evidence was objected to by the plaintiff, on the ground that the lunacy proceedings were conclusive as against Joseph H. Jones. The objection being overruled, plaintiff excepted. At the conclusion of the trial, the court found that Richard Hughes was competent to execute the deed in question, and dismissed the plaintiff's complaint. The plaintiff, Hughes, was a legitimate and the defendant, Jones, an illegitimate child of the grantor, whose deed the former sought to have set aside.

George Wadsworth, for the appellant.

Spencer Clinton, for the respondents.

VANN, J. On the trial of this action, the court found, as a fact, upon a conflict of evidence, "that said Richard Hughes, at the time of the execution and delivery of the said deed, ... was mentally competent to execute the same; that said deed was not executed by said Richard Hughes through force, fraud, or undue influence imposed upon him by said defendants, or any or either of them, but the same was the free and voluntary act and deed of said Richard Hughes." It is conceded that there was sufficient evidence to sustain this finding, unless the record in the lunacy proceeding was conclusive evidence, and hence the facts found by the jury therein incapable of contradiction by the defendants in this action.

All contracts of a lunatic, habitual drunkard, or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void, until, by permission of the court, he is allowed to assume control of his property: *L'Amoureaux* v. *Crosby*, 2 Paige, 422; 22 Am. Dec. 655; *Wadsworth* v. *Sharpstein*, 8 N. Y. 388; 59 Am. Dec. 499; 2 R. S., p. 1094, sec. 10. In such cases, the lunacy record, as long as it remains in force, is conclusive evidence of incapacity: Id.

Contracts, however, made by this class of persons before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence: 2 R. S., p. 1094, sec. 10; *Van Deusen* v. *Sweet*, 51 N. Y. 378; *Banker* v. *Banker*, 63 Id. 409. Under such circumstances,

the proceedings in lunacy are presumptive, but not conclusive, evidence of a want of capacity. The presumption, whether conclusive or only *prima facie*, extends to all the world, and includes all persons, whether they have notice of the inquisition or not: *Hart* v. *Deamer*, 6 Wend. 497; *Osterhout* v. *Shoemaker*, 3 Hill, 513; 1 Greenl. Ev., sec. 556.

These principles are now well settled in this state, and no question could have arisen as to the right of the defendants to show that the grantor, at the time the conveyance in question was executed, was of sound mind, but for the fact that the grantee was the petitioner in the lunacy proceedings. It is claimed that he thereby became a technical party to the record, as that expression is commonly understood in law, and hence, that he is so completely bound by the finding of the jury as to be precluded from attempting to show the actual truth. This point does not appear to have been passed upon by the courts, although there are *dicta* of learned judges bearing somewhat upon it.

A party is, ordinarily, one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings, almost without exception. Unless a party has some personal interest in the result, he can have no standing in court. But any one, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute, it was also the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed lunatic: Code Civ. Proc., sec. 2323; *In re Smith*, 1 Russ. 348; *In re Persse*, 1 Molloy, 439; Shelford on Lunatics, 94; 2 Crary's New York Practice, 5; Ordronaux's Judicial Aspects of Insanity, 218.

The origin and history of lunacy proceedings throw some light upon the subject. It was provided by an early statute in England that "the king shall have the custody of the lands of natural fools [idiots], taking the profits of them without waste or destruction, and shall find them in necessaries, of whose fee soever the lands be holden; and after their death he shall restore them to their rightful heirs, so that no alienation shall be made by such idiots, nor their heirs be in any wise disinherited": 17 Edw. II., c. 9. The same statute pro-

vided for lunatics, or such as might have lucid intervals, by making the king a trustee of their lands and tenements, without any beneficial interest, as in the case of idiots, who were the source of considerable revenue to the crown: Id., c. 10; *Beverley's Case*, 4 Coke, 127 a; 1 Bla. Com., c. 8, sec. 18, p. 304. This statute continued in force from 1324 until 1863: Ordronaux's Judicial Aspects of Insanity, 4. The method of procedure thereunder is described by an early writer as follows: "And, therefore, when the king is informed that one who hath lands or tenements is an idiot, and is a natural from his birth, the king may award his writ to the escheator or sheriff of the county where such idiot is to inquire thereof": Fitzherbert's Natura Brevium, 232. The object of the writ was to ascertain, by judicial investigation, whether the person proceeded against was an idiot or not, so that the king could act under the statute, for his right to control idiots or lunatics and their estates did not commence until office found: Shelford on Lunatics, 14. Subsequently, authority was given to the lord chancellor to issue the writ or commission to inquire as to the fact of idiocy or lunacy, and the method of procedure was by petition suggesting the lunacy: Id.; *In re Brown*, 1 Abb. Pr. 108, 109. It was the ordinary writ upon a supposed forfeiture to the crown, and the proceeding was in behalf of the king as the political father of his people: Id.; Fitzherbert's Natura Brevium, 581. As the means devised to give the king his right by solemn matter of record, it was necessary before the sovereign could divest title: 3 Bla. Com. 259; *Phillips* v. *Moore*, 100 U. S. 208, 212; Anderson's Law Dict., tit. Office Found. It was used to establish the fact upon which the king's rights depended, as in the case of an alien who could hold land until his alienage was authoritatively established by a public officer upon an inquest held at the instance of the government. Whether the basis of action was lunacy or alienage, or otherwise, the proceeding was in behalf of the public, represented by the king: Id. The inquisition was an inquiry made by a jury before a sheriff, coroner, escheator, or other government officer, or by commissioners specially appointed, concerning any matter that entitled the sovereign to the possession of lands or tenements, goods or chattels, by reason of an escheat, forfeiture, idiocy, and the like: Chitty on Prerogatives, 246, 250; Staunt. 55; Rapalje and Lawrence's Law Dict., tit. Inquest of Office.

Thus the law came to us from England, and after the Revo-

lution, the care and custody of persons of unsound mind, and the possession and control of their estates, which had belonged to the king as a part of his prerogative, became vested in the people, who, by an early act, confided it to the chancellor, and afterwards to the courts: Laws 1788, c. 12; 2 Greenl. Ev. 25; Laws 1801, c. 30; Laws 1847, c. 280; 1 R. S. 147; 2 Id. 52.

But while the same power was confided, the practice or method of exercising that power was not regulated by the legislature, so that, almost of necessity, the English course of procedure was followed: *Matter of Brown, supra.*

For nearly a century there was no statute authorizing any court or officer to issue a commission of inquiry, except as the right to judicially ascertain who were lunatics, etc., was implied from the acts committing their care and custody at first to the chancellor, and later to the supreme court. The right to judicially learn whether a person was a lunatic or not was inferred from the right to his care and custody, provided he was such. Thus it appears that these proceedings have always been instituted in behalf of the public, at first, in behalf of the king, as the guardian of his subjects, and then in behalf of the people of the state, who succeeded to the rights of the king in this regard. In both countries, the theory of the proceeding was the same, resting upon the interest of the public, as is apparent from an examination of the various statutes and decisions upon the subject already cited. That interest is promoted by taking care of the persons and property of those who are unable to care for themselves, and, by preserving their estates from waste and loss, preventing them and their families from becoming burdens upon the public. The inquisition is an essential step preliminary to assuming control. It is a judicial determination that the person proceeded against is one of the class of persons whose care and custody has been delegated to the courts by the public. Although it involves the forfeiture or suspension of civil rights over person and property, it acts upon the *status* of the individual only. All the other results follow the judicial decision that the *status* of the alleged lunatic has changed from soundness to unsoundness of mind. It is then, and only then, that the courts assume control, which they exercise through their own appointee, who is subject, at all times, to their orders. The whole world is bound by the inquisition, and no one, unless it is the lunatic himself, more than another. The law is set in motion by information of a more or less formal character spread before the

court, not by a party, but as in a criminal prosecution, by some one who assumes to act in the matter. While the petitioner, in rare cases, has been required to pay costs, it was because he acted in bad faith toward the court by calling upon it to act when he knew that there was no ground for action.

For the same reason, Lord Eldon required the brothers and sisters of a supposed lunatic, who could not be considered parties in any sense, to pay the costs occasioned by their opposition to a petition for a commission of lunacy presented by strangers to the family: *In re Smith*, *supra*.

The primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control. The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter.

Attentive study of the history, nature, and object of lunacy proceedings leads to the conclusion that the petitioner therein is not a party to the record so as to be personally estopped by the finding of the jury, except as all the world is estopped.

We also agree with the learned general term in its conclusion that the title to land was not involved in the proceeding under consideration, and that a commission to inquire as to the mental *status* of an alleged lunatic has no power to settle any such question. Such a tribunal is not adapted to so important an inquiry. It is not constituted for such a purpose, but simply to inform the conscience of the court as to a particular fact, for a special purpose. It would have no pleadings to guide it. No distinct issue upon the subject could be presented. It would be only incidental to the main question, which relates to existing incapacity. When that is found, the care of the person and estate belongs to the court. Unless that is found, the court has no further jurisdiction, whatever else may be found. No other inquiry can become material except from its relation to that question. The command of the commission is to inquire whether the person is a lunatic, and if so, from what time, in what manner, and how. The period of the incapacity is of no importance unless it includes the present time.

The secondary character of the inquiry as to duration is evident from the fact that if the jury find the alleged lunatic to be of sound mind, they have no power to pass upon any other question, even if they are of the opinion that he has been

insane. Moreover, the petitioner would not be allowed to control the proceeding by a settlement or discontinuance, or by submitting to a nonsuit, except by permission of the court, which could allow any one to continue if he abandoned it: Shelford on Lunatics, 22.

The difficulty of correcting errors by appeal or review is obvious. In fine, such a method of determining the title to real estate is opposed to the theory and policy of the law, which surrounds landed property with so many safeguards.

We think that the validity of the deed in question was not at issue, and that it could not properly be tried in the lunacy proceeding.

The judgment should be affirmed, with costs.

LUNATICS — CONTRACTS OF. — The general rule as to deeds executed by lunatics is, that they are not absolutely void, but only voidable: *Pearson* v. *Cox*, 71 Tex. 246; 10 Am. St. Rep. 740, and note; note to *Allis* v. *Billings*, 39 Am. Dec. 749. Compare note to *Jackson* v. *King*, 15 Id. 361–368, as to the validity of contracts, generally, made by a lunatic. Sureties upon the note of a lunatic are liable to the payee thereof, who received the note in ignorance of the maker's unsoundness of mind: *Lee* v. *Yandell*, 69 Tex. 34. Judgments against lunatics are neither void nor voidable: *Moloney* v. *Dewey*, 127 Ill. 395; 11 Am. St. Rep. 131, and note.

LUNATICS. — One claiming that a will or contract was made by a lunatic during a lucid interval must prove the existence of the lucid interval, and that the will or contract was made then: *Cochran's Will*, 1 T. B. Mon. 264; 15 Am. Dec. 116, and note.

PROCEDURE UNDER A WRIT DE LUNATICO INQUIRENDO. — A return to an inquisition in the nature of a writ *de lunatico inquirendo* should show whether the alleged lunatic is so bereft of reason as to warrant his being deprived of power over his person and property: *In re Lindsley*, 44 N. J. Eq. 564; 6 Am. St. Rep. 913, and note. For a person may be of weak mind, yet not be of unsound mind: *Anderson* v. *State*, 25 Neb. 550.

Where the statute prescribes a certain method of procedure to determine whether persons are insane, or habitual drunkards, such inquiries must be conducted in the mode prescribed by the statute, and not otherwise: *Appeal of Meurer*, 119 Pa. St. 115. The statute in Arkansas regulating proceedings against insane persons must be followed strictly: *Cox* v. *Gress*, 51 Ark. 224. In Tennessee, inquisitions of lunacy had in county courts in that class of cases over which the chancery courts have concurrent jurisdiction must conform as nearly as possible to the rules respecting such inquisitions in the chancery courts: *Davis* v. *Norvell*, 87 Tenn. 36. In Pennsylvania, the court of common pleas has no power to set aside an inquisition finding the fact of lunacy in a proceeding *de lunatico inquirendo*, upon the ground that the evidence is insufficient to sustain the finding: *In re Weaver*, 116 Pa. St. 225.

JOHNSTON *v.* TRASK.

[116 NEW YORK, 136.]

STATUTE OF FRAUDS — AGREEMENT TO REPURCHASE. — An oral contract by which a person sells his own chattels or choses in action for more than fifty dollars, payment and delivery being made, and agreeing to take them back from and to repay the purchase price to the purchaser on demand, is an entire contract, and the promise to take back the property and repay the purchase price is not void by the statute of frauds.

BROKER'S AGREEMENT TO REPURCHASE OF CUSTOMER. — An agreement by brokers to purchase for a customer a certain amount of mortgaged bonds, and to take them off his hands at what they cost him, at any time when he should wish to get rid of them, is an entire contract, and the purchaser may compel the brokers to take such bonds from him and repay him the purchase price thereof.

BANKERS AND BROKERS — PRESUMPTION AS TO SCOPE OF BUSINESS OF. — Where it appears that certain persons were doing business as bankers and brokers, and that they by their managing partner agreed to purchase certain bonds, and that if the purchaser should become dissatisfied with the purchase, that they would take them off his hands at what they cost him, it will not be presumed that this contract was beyond the scope of the business of the firm nor of the managing partner's authority.

LACHES. — ONE HAVING THE PRIVILEGE OF RETURNING PROPERTY TO A PERSON OF WHOM HE PURCHASED IT, and of thereupon receiving back the purchase price, is not guilty of laches in delaying its return when he was advised by such person not to make such return, and that the property was good and would ultimately advance in the market.

ACTION for a breach of contract. The defendants, ever since January, 1882, have been doing business as partners under a firm name as bankers and brokers. From the testimony taken at the trial, it appeared that in January, 1882, the managing partner of the firm made an oral agreement to purchase for plaintiff, if they could be bought in the market, income mortgage bonds of the Ohio Central railroad, of the par value of ten thousand dollars, and that in case the plaintiff should want to get rid of them at any time, that the defendants would take them off his hands at what they cost him. Afterwards, on the same day, the defendants bought for plaintiff bonds for the sum of $4,800, for which purchase they charged him a commission of $12.50. The plaintiff paid one thousand dollars on the purchase price, and the defendants retained the bonds, as security for the balance of the purchase-money, until November, 1882, when such balance and the commissions and interest were paid by plaintiff, and he received possession of the bonds. On April 28, 1884, the market price of the bonds had declined to about ten cents on a dollar, and on that day the plaintiff tendered the bonds to the defendants, and demanded that they

should repay him $4,812.50. This they refused to do, and two days later this action was brought to recover that sum. At the close of plaintiff's evidence, the defendants moved for a nonsuit, on the ground that the contract was oral, and was void in not complying with a section of the statute of frauds of New York, which declared that every contract for a sale of any goods and chattels or things in action for the price of fifty dollars or more should be void, unless a note or memorandum of the contract was made in writing and subscribed by the parties to be charged, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action, or unless the buyer shall at the time pay some part of the purchase-money; and second, that the evidence was insufficient to show that the managing partner had authority to bind the firm by the contract; and further, that the plaintiff had not tendered the return of the bonds and demanded repayment of the purchase price within a reasonable time. The motion for a nonsuit was denied, and a verdict was directed to be entered in favor of plaintiff for four thousand eight hundred dollars and interest.

Horace E. Smith, for the appellants.

John M. Carroll, for the respondent.

FOLLETT, C. J. An oral contract, by which a person sells his own chattels or choses in action for more than fifty dollars, payment and delivery being made, and agrees to take them back from and repay the purchase price to the purchaser on demand, is an entire contract, and the promise to take back the property, and repay the purchase price, is not void by the third section of the statute of frauds: *Wooster* v. *Sage*, 67 N. Y. 67; *Fitzpatrick* v. *Woodruff*, 96 Id. 561; *White* v. *Knapp*, 47 Barb. 549; *Williams* v. *Burgess*, 10 Ad. & E. 499; *Fay* v. *Wheeler*, 44 Vt. 292; *Dickinson* v. *Dickinson*, 29 Conn. 600; 1 Benjamin on Sales, Corbin's ed., sec. 169.

Executed contracts of sale embracing a promise by vendors of chattels that in case they do not suit the purchaser, or do not possess certain specified qualities, the vendor will repay to the vendee the purchase price upon their return, have been frequently considered by the courts: *Towers* v. *Barrett*, 1 Term Rep. 133; *Thornton* v. *Wynn*, 12 Wheat. 189; but no case has been cited holding that such a promise on the part of a vendor is an independent contract. When an agent, by an oral contract, sells and delivers the goods of a disclosed principal,

his personal oral warranty of quality is not a contract independent of the contract of sale, but is a part of it; and one consideration is sufficient to support the sale and warranty. The oral contract of the defendants, that they would purchase for the plaintiff in the market at market rates the bonds for the usual compensation, and in case he should thereafter become dissatisfied with the bonds, that they would, on demand, take them off his hands at what they cost him, was a single contract. Under this contract, the bonds were purchased and held by the defendants until the purchase price and their commissions were paid, and then they delivered the bonds to the plaintiff. The promise of the defendants, that they would take the bonds off the plaintiff's hands at what they cost him, upon request, is not a contract for the sale of goods, chattels, or things in action, within the third section of the statute of frauds, but is a provision for the rescission of the entire contract, and is valid.

The learned counsel for the appellants, in support of his contention, cites *Hagar* v. *King*, 38 Barb. 200. In that case, a firm was indebted to the plaintiffs in the action for work performed in constructing part of a railroad. The defendant, who was one of the firm, asked the plaintiffs to take from the railroad corporation its bonds in payment of the debt, orally agreeing with the plaintiffs, for himself, that if they would so take the bonds, he, not the firm, would, within ten days, take the bonds from and pay to the plaintiffs the amount of the firm's debt. The plaintiffs assented to the proposal. Afterwards, they accepted from the corporation its due-bill for the amount due them for their work, payable in the bonds of the corporation, and gave a receipt for all of their demands for work done on the road. The plaintiffs then indorsed the due-bill, delivered it to the corporation, and received the bonds. Within ten days, the plaintiffs tendered the bonds to the defendant, and demanded the amount for which they were taken in payment. It was held that the oral agreement embraced two contracts, one to accept the bonds in payment of the debt, and another to purchase the bonds at a future day at a given price, and that the latter contract was within the third section of the statute of frauds, and void. That case is easily distinguishable from the one at bar. The defendant in that case, as an individual, was not indebted to the plaintiffs, and his individual contract to take back the bonds was held to be distinct from the contract by which the firm's debt was paid

in the manner described. Was the evidence sufficient to sustain the conclusion that the managing partner was authorized to make the contract in behalf of the firm?

The defendants admitted in their answer that they were bankers and brokers, and that they entered into that part of the contract by which they agreed to purchase the bonds for the plaintiff, which, by their concession, was within the ordinary business of the firm. But they neither averred in their answer nor gave evidence tending to show that the promise to take back the bonds was beyond the scope of their business. There being no evidence which shows that the transaction was actually beyond the scope of the business of the firm, the question arises, whether it was apparently beyond the scope of its business: *Union Nat. Bank* v. *Underhill*, 102 N. Y. 336. The case shows that, in addition to the business usually done by bankers and brokers, the defendants were accustomed to purchase and carry securities on margins for their customers. The undisputed evidence is, that the managing partner did make the promise upon which the plaintiff recovered, thus asserting his authority to make it in the name and in behalf of the firm. No evidence is found in the record which would justify the court in holding, as a matter of law, that the promise upon which the action was brought was so far beyond the scope of the business of the firm that the plaintiff had no right to rely upon it. The evidence was sufficient to cast upon the defendants the burden of rebutting the presumption arising from the evidence and the pleadings; and they having failed to do this, no error was committed in refusing to nonsuit on the ground that the managing partner had no authority to bind the firm by this contract.

The third ground upon which a nonsuit was asked for is not supported by the evidence. The undisputed evidence is, that the managing partner of the firm, on several occasions, advised the plaintiff not to part with the bonds, and assured him that they were good, and would ultimately advance in the market. Under these circumstances, the plaintiff was not guilty of laches in not earlier returning the bonds, and demanding the price paid: *Wooster* v. *Sage*, *supra*.

The judgment should be affirmed, with costs.

STATUTE OF FRAUDS. — Under the statute of frauds, a parol promise to reconvey lands is void, whether made before or after the conveyance to the promisor: *Clearman* v. *Catton*, 66 Miss. 467; *Slocum* v. *Wooley*, 43 N. J. Eq. 451.

LACHES. — Laches in suing for a specific performance of a contract for the sale of real estate will not defeat plaintiff, if such delay was the result of the acts of defendants, or their predecessors in interest, in attempting to deceive the plaintiff, and to deprive him of the benefit of his contract: *Karns* v. *Olney*, 80 Cal. 90; 13 Am. St. Rep. 101; compare extended note to *Bell* v. *Hudson*, 2 Id. 795–808, upon the subject of laches generally.

DOLL *v.* NOBLE.

[116 NEW YORK, 230.]

CONTRACT TO DO WORK UPON PROPERTY TO THE ENTIRE SATISFACTION OF ITS OWNER, and in the best workmanlike manner, is satisfied by doing such work in a good and workmanlike manner. The owner cannot avoid payment by arbitrarily and unreasonably saying that he is not satisfied.

J. H. V. Arnold, for the appellant.

Samuel Untermyer, for the respondents.

BROWN, J. This action was brought to recover a balance due upon a written contract, by which the plaintiffs were to do polishing, staining, and rubbing on the wood-work of two houses owned by the defendant, and also for certain extra work upon the same houses. The defendant denied that the contract had been performed by the plaintiffs, or that anything was due them from him.

The contract provided that the work was to be done "in the best workmanlike manner, under the supervision of William Packard, superintendent, and to the entire satisfaction of William Noble, the party of the first part, owner." The court submitted the case to the jury under a general charge, to which no exception was taken, and which, in substance, instructed the jury that if the work under the contract was done in the best workmanlike manner, the plaintiffs would be entitled to recover, and that the defendant could not defeat such recovery by unreasonably, and in bad faith, saying the work was not done to his satisfaction; that while the contract provided that it was to be done to the owner's satisfaction, that clause must be regarded as qualified by the other provisions of the contract, that it was to be done in the best workmanlike manner; and that was the test of a correct and full performance of the contract.

The evidence was conflicting upon the question whether the work under the contract was done in a workmanlike manner, and also as to the extra work. The jury, however, found a verdict for the full amount claimed, and we must assume

that the result was correct, unless the court erred in its construction of the written agreement. While no exception was taken to the charge of the court, to which I have referred, the defendant, at the close of the charge, requested the court to instruct the jury that the defendant was entitled, under the contract, to have plaintiffs do the work "to his entire satisfaction before the plaintiffs became entitled to the final payment." To which the court responded: "I so charge, subject to the qualification which I have already made. He must not attempt to defeat a just claim by arbitrarily and unreasonably saying he is not satisfied. The work must be done according to the contract." To this ruling the defendant excepted, and this exception presents the principal question in the case.

The ruling of the court was correct. The question was directly presented in the case of *Bowery Nat. Bank* v. *Mayor etc.*, 63 N. Y. 336. In that case the certificate of the "water purveyor," that the stipulations of the contract were performed, was made a condition precedent to payment. It was conceded that the contract was completed and performed, but the "water purveyor" declined to give a certificate. The plaintiff was defeated in the supreme court, but in this court the judgment was reversed, the court saying: "It was necessary for them [the plaintiffs], either to prove upon the trial the making of such certificate, or to show that it was refused unreasonably and in bad faith. It was unreasonable to refuse it, if it ought, in the contemplation of the contract, to be given. In such contemplation it ought to have been given, when, in any fact, and beyond all pretense of dispute, the state of things existed to which the water purveyor was to certify, to wit, the full completion of the contract in each and every one of its stipulations."

That when the parties have made the certificate of a third person of the performance of the work a condition precedent to payment, such certificate must be produced, or its absence explained, is the general rule: *Smith* v. *Briggs*, 3 Denio, 74. But all the authorities recognize the exception that when such certificate is refused in bad faith or unreasonably, the plaintiff may recover upon proof of performance of the contract: *Smith* v. *Brady*, 17 N. Y. 176; 72 Am. Dec. 442; *Thomas* v. *Fleury*, 26 N. Y. 26; *Wyckoff* v. *Meyers*, 44 Id. 145; *Nolan* v. *Whitney*, 88 Id. 648; *United States* v. *Robeson*, 9 Pet. 328; *Smith* v. *Wright*, 4 Hun, 652; *Whiteman* v. *Mayor etc.*, 21 Id. 121.

The reason for the exception applies with much greater force where the work is to be done to the satisfaction of the party himself than to cases where the certificate of a third party is required. A party cannot insist on a condition precedent when he has himself defeated a strict performance: *Butler* v. *Tucker*, 24 Wend. 449.

In this case Judge Bronson well says: "The defendant does not set up that part of the covenant which requires the work to be done to his satisfaction. As to that it would probably be enough for the plaintiff to aver that the work was in all other respects completed in pursuance of the contract; for if the defendant was not satisfied with such a performance, it would be his own fault." See also *Duplex Safety Boiler Co.* v. *Garden*, 101 N. Y. 387; 54 Am. Rep. 709.

None of the cases cited by the appellant hold a different rule. Many of them recognize the exception I have pointed out, and those that do not are easily distinguishable from the case under consideration. It is not deemed necessary to refer to them more specifically.

We have examined the other questions raised by the exceptions, but none of them are of sufficient importance to require discussion.

The judgment should be affirmed, with costs.

CONTRACTS. — The words "to satisfaction," and such like expressions, used in contracts, must receive a reasonable construction: *Hawkins* v. *Graham*, 149 Mass. 284; 14 Am. St. Rep. 422, and particularly cases cited in note; *Plano Mfg. Co.* v. *Ellis*, 68 Mich. 101; *Chism* v. *Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668.

GREENLAND *v.* WADDELL.

[116 NEW YORK, 234.]

A WILL PRODUCES AN EQUITABLE CONVERSION OF REAL ESTATE INTO PERSONALTY when it devises such real estate to the executors, and gives them a power of sale for the purpose of disposing of the proceeds among designated beneficiaries.

THE DIFFERENCE BETWEEN AN EXECUTOR AND A TRUSTEE IS, that the duties of the former pertain to the office, and those of the latter to the person. When a discretionary power of sale is given to an executor, or when, in the sense as applied to trusts, the duties imposed are active, the executors will be deemed trustees, and such powers cannot be executed by an administrator with a will annexed.

WHERE LANDS ARE DEVISED TO EXECUTORS WITH POWER OF SALE, THE RESIGNATION OF ONE OF THEM AS TRUSTEE and the appointment of another as trustee in his place does not relieve the former from execution

of the trust which was devolved on him in virtue of his office of executor. While an executor remains in his relation as such, the court cannot appoint a trustee to supersede him in the exercise of his functions of executor.

PERPETUITIES. — A will devising and bequeathing property to executors, with power to sell the same, and pay the income to Mrs. B. during the joint lives of herself and husband, and in case Mrs. B. should die before her husband, leaving living issue, then to pay such income towards the support of any child or children she may leave, until the youngest reaches twenty-one years of age, to pay all of such property that may be left to him or them, and if none of such children attains twenty-one years of age, then to pay said property to testator's brother, creates a perpetuity forbidden by that provision of the Revised Statutes of New York declaring that the ownership of personal property shall not be suspended for a longer period than two lives in being at the death of the testator.

ELECTION. — PERSONS BENEFITED BY THE EQUITABLE CONVERSION OF REAL ESTATE INTO PERSONALTY BY WILL may elect to have a reconversion into realty, and take it as land, rather than the proceeds of it.

ACTION to recover upon a certified bank check representing a balance alleged to be due on the purchase price of real estate conveyed in March, 1885, by the plaintiff to the defendant, Waddell. Whether the plaintiff was entitled to recover or not depended upon the title to the property thus conveyed being "such as a party could be compelled to accept under a contract assuring a title in fee." The defendant claimed that the deed did not convey him a good title to one third of the premises, and he had tendered a reconveyance to plaintiff, and demanded repayment of the money he had paid. At one time the title to the real property in controversy was vested in Agnes Boerum, who thereafter died, in the year 1875, leaving, as her heirs at law and next of kin, her brother, Volkert R. Boerum, and her two sisters, Mrs. Vanderveer and Mrs. Bush. The decedent had left a will, by which she had appointed her brother, Volkert R. Boerum, and her brother-in-law, Charles H. Vanderveer, her executors, and letters testamentary had issued to them. That portion of her will considered in the opinion of the court is as follows: "After all my lawful debts are paid and discharged, I give and bequeath and devise unto my executors, and the survivor of them, all and singular my estate and property, real and personal, to have and to hold the same in trust, to receive and collect the rents, issues, and profits, interest and income thereof, and as soon after my decease as in their judgment they shall deem expedient and for the best interest of my estate, to sell, assign, transfer, dispose of the same either at public or private sale, and to divide, pay, and distribute the proceeds thereof, together with the whole of

my estate, as follows: To my sister Susan Vanderveer, wife of Charles H. Vanderveer, one equal third part thereof; to my brother, Volkert R. Boerum, one equal third part thereof. The remaining one equal third part thereof I hereby order and direct my said executors safely and securely to invest and reinvest from time to time, in their discretion, upon such security and in such manner as they shall deem advisable and proper, to receive and collect the interest or income thereof, and as the same shall by them be so collected, to pay the same to my sister Adrianna Bush, wife of Charles Bush, for and during the joint lives of her and her husband; and in case my said sister Adrianna Bush shall die before her said husband, leaving lawful issue surviving her, then my executors shall, from and after such death, pay such interest or income thereof, or such portion of such interest or income as may be necessary, towards the support, maintenance, and education of the child or children of my said sister Adrianna Bush, until the youngest child shall arrive at the age of twenty-one years; and on said youngest child arriving at such age, my said executors shall pay and transfer to the child or children that shall then be living the whole of said remaining one third, with its accumulations, and on the death of all said children before arriving at such age, or on the death of my said sister Adrianna without leaving lawful issue her surviving, my executors shall pay the remaining one third, with its accumulations, to my brother, Volkert R. Boerum, and my sister, Susan Vanderveer, to be divided equally between them, share and share alike; and in case my said sister Adrianna Bush shall survive her husband, Charles Bush, then, on the death of her said husband, the said remaining one third, with its accumulations, shall be paid and transferred to my said sister Adrianna Bush absolutely, in preference to any other disposition thereof." The executor Vanderveer died in 1883. In February, 1884, Volkert R. Boerum and Susan Vanderveer conveyed their interest in the property to Mrs. Bush. Afterwards, upon the petition of Boerum, an order was made by the supreme court accepting his resignation as trustee of such will, and discharging him accordingly, and appointing Mrs. Bush trustee under the will. Soon afterwards, she, as trustee, made a deed of the property to one Josslyn, who thereupon reconveyed it to her, and she then conveyed it to plaintiff. Before final judgment was entered in this case, and during the pendency of the action, a further conveyance was made by Mrs. Bush, as trustee, to the

plaintiff. Plaintiff had judgment in the trial court, which was reversed by the general term.

Jesse Johnson, for the appellant.

A. B. Carrington, for the respondents.

BRADLEY, J. The question is, whether or not the deed of conveyance made by the plaintiff to the defendant Waddell was effectual to convey a perfect title to the one third of the premises of which Agnes Boerum died seised; and that depends upon the result of the inquiry, whether the deeds of Mrs. Bush, individually, and as trustee of the will of Agnes Boerum, to plaintiff, conveyed such title to him.

The will was productive of an equitable conversion of the real estate of the testatrix into personalty, and, for the purpose of the execution of the trusts created by the will, it must be so treated: *Kane* v. *Gott*, 24 Wend. 640; 35 Am. Dec. 641; *Stagg* v. *Jackson*, 1 N. Y. 206; *Everitt* v. *Everitt*, 29 Id. 39. By the terms of the will the entire estate of the testatrix was devised and bequeathed to the executors, and they were given the power of sale, for the purpose of distributing the proceeds as directed, that is to say, two thirds of the amount to be paid to two distributees, and the income of the other third to Mrs. Bush while she remained the wife of her then husband. If she survived him, she was to take the *corpus* of the fund; and if she did not, it was to go to her lawful issue, if she left any surviving her who reached the age of twenty-one years; otherwise, it should go to her brother, Mr. Boerum, and her sister, Mrs. Vanderveer.

The executors took no title to the real estate as such. They were vested with a power to deal with it as personal estate for the purposes of the execution of trusts created by the will; and one question presented is, whether the power of sale came within the duty of a trustee, as distinguished from that of an executor. The question as to where is located the line between the duties which fall upon an executor, and may be discharged by an administrator with the will annexed, and the powers which must be executed by a trustee, has been involved in some uncertainty, in view of the apparent want of harmony in judicial opinion upon the subject. The theory upon which the distinction seems to have been founded is, that the duties of an executor pertain to the office, and those of a trustee to the person; that the character given to a trustee has relation to a personal trust, while that of an executor is

official solely. Hence it has, in the more recent case of *Mott* v. *Ackerman*, 92 N. Y. 553, been said by Judge Finch, in speaking for the court, that "where the power granted or duty involved imply a personal confidence reposed in the individual over, above, and beyond that which is ordinarily implied in the selection of an executor, the power and duty are not those of executors *virtute officii*, and do not pass to the administrator with the will annexed"; and when a discretionary power of sale is given to executors, or when, in the sense as applied to trusts, the duties imposed are active, the executors will be deemed trustees, and such powers cannot be executed by an administrator with the will annexed: *Cooke* v. *Platt*, 98 N. Y. 35; *Ward* v. *Ward*, 105 Id. 68.

In the present case, the real estate of which the testatrix died seised became, by virtue of the direction in her will to sell, for the purposes there mentioned, personalty as of the time of her death, upon the principle applicable to such case, that what is directed to be done by the will may be regarded as done at the time directed. The doctrine of equitable conversion rests upon that principle: Pomeroy's Eq. Jur., sec. 161. The power to receive the rents and profits of the land, intermediate the death of the testatrix and the sale, did not qualify the character, as personalty, of the land in the hands of the executors. That is incidental to the direction to sell, and the rents and profits so received also have the character of personalty, and are assets in the hands of the executor: *Stagg* v. *Jackson*, 1 N. Y. 206; *Lent* v. *Howard*, 89 Id. 169. The title to the personalty vested in the executors by operation of law; and to accomplish the purpose of the imperative direction in the will in that respect, it was within their power, and imposed upon them as a duty, by virtue of their office, to execute the power of sale: *Lockman* v. *Reilly*, 95 Id. 64; *Meakings* v. *Cromwell*, 5 Id. 136; *Bogert* v. *Hertell*, 4 Hill, 492. As the consequence of this, the proceeds of the sale, when received by the executors, would be legal assets in their hands, for which they would be required to account: *Hood* v. *Hood*, 85 N. Y. 561. And if any duties were to follow, in respect to one third of the fund, which would require the function of a trustee to execute, the executors, as such, would remain responsible for it until the severance in some manner by them of the trust fund: *In re Hood*, 98 Id. 363.

We have proceeded far enough to show the relation of the executors, as such, to the powers given by the will, sufficiently

for the purpose of the question here. And it is unnecessary to consider the nature of the duties which would be assumed after the sale, in the management of the fund, the income of which they were directed to pay Mrs. Bush.

The power of sale was vested in the executors; and, in view of the later authority giving construction to the statute in that respect (2 R. S., p. 72, sec. 22), that power of sale would be taken by an administrator with the will annexed: *Mott* v. *Ackerman*, 92 N. Y. 539. It is, however, contended by the plaintiff's counsel, that, notwithstanding the correctness of the proposition just stated, the power given to sell created a trust for that purpose, and as such came within the jurisdiction of the supreme court, and therefore the acceptance of the resignation of Boerum as trustee, and the appointment of Mrs. Bush as such by the court, pursuant to the statute, was effectual to vest in the latter the power to make the sale: 1 R. S., p. 730, secs. 69–71. There is no doubt about the power of the court to provide the means for the execution of a trust when there ceases to be a trustee to complete it. The statute provides that in case of death of a trustee of an unexecuted express trust, the trust shall vest in the court of chancery (now in the supreme court) with all the powers and duties of the original trustee, and shall be executed by some person appointed for the purpose under the direction of the court: Id., sec. 68. And that provision is applicable to powers in trust: Id., p. 734, sec. 102. It is said by text and judicial writers, to the effect that the court of equity will not permit a trust to fail for want of a trustee to execute it. This means that the power of appointment of a trustee will be exercised by the court when occasion properly arises requiring it. Such were the cases of *Leggett* v. *Hunter*, 19 N. Y. 445; *Delancy* v. *McCormack*, 88 Id. 174; *Farrar* v. *McCue*, 89 Id. 139; *Cooke* v. *Platt*, 98 Id. 35; *Rogers* v. *Rogers*, 111 Id. 228. And they are cited by counsel to support the contention that the trustee appointed by the court in the present case was vested with the power to make the sale and conveyance in question. It may be observed that those cases presented express trusts and powers in trust within the Revised Statutes, and therefore came within the statute before referred to, providing for the appointment of trustees to execute such trusts, and the appointments were essential for the execution of the trusts. The power of sale given by the will in question is not within the statutory term of express trusts, and no title passed to the executor of

the land as such; and "a general power is in trust when any person or class of persons other than the grantee of such power is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the execution of the power": 1 R. S., p. 734, sec. 94.

The statute upon the subject of trusts is not applicable to that created by this will, although analogous principles, to some extent at least, are applied to those of personal property: *Kane* v. *Gott*, 24 Wend. 640; 35 Am. Dec. 641; *Cutting* v. *Cutting*, 86 N. Y. 545. It may be assumed that the power is inherent in the supreme court, without the aid of the statute, to administer trusts, in so far that it may, upon the death or disability of a trustee of an unexecuted trust, appoint another to execute it, and for adequate cause may remove a trustee and supply his place with another to complete the execution of a trust. This proposition is not applicable to an executor, so far as relates to the duties of his office as such. As applied to him, the power is exclusively in the probate court.

The acceptance of the resignation, as trustee, of the person named as executor in the will, did not, therefore, have the effect to relieve him from the execution, so far as it remained unexecuted, of the trust which was devolved upon him by virtue of the office of executor: 1 Perry on Trusts, sec. 281; *In re Van Wyck*, 1 Barb. Ch. 565; *Quackenboss* v. *Southwick*, 41 N. Y. 117. While his relation as trustee, as distinguished from that of executor, may be treated as terminated by force of the order of the court, that of executor remained. And, as held in *Mott* v. *Ackerman*, *supra*, the power to make the sale being within the functions of the office of the executor, there is no occasion to extend the inquiry whether it would be in the jurisdiction of the supreme court to appoint a trustee to execute such a trust or power as that in question, in the event of a vacancy in the office of executor, or whether the power must, in such case, necessarily be executed by an administrator with the will annexed. While the executor remains in his relation as such, the court cannot appoint a trustee to supersede him in the exercise of his functions as executor. It cannot be assumed, upon the findings of the trial court, that all the duties of that officer had been discharged by him at the time his resignation of trustee was accepted by the court. The conclusion must follow that the power to make the sale and conveyance remained in the executor, and that Mrs. Bush did not, through her appointment as trustee, take such power. This was the

ground upon which the general term placed its determination, and, so far as appears, the inquiry there was not extended further than that.

There is a further question having relation to the validity of the provisions of the will, by which the testatrix sought to give the fund to the children of Mrs. Bush, if she left any surviving her, and in the event there mentioned. This question arises upon the statute which provides that "the absolute ownership of personal property shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator": 1 R. S., p. 773, sec. 1. At the time of the death of the testatrix, Mrs. Bush had no children living, and she never has had any. But assuming that she does not survive her husband, and that on her death she leaves children surviving her under the age of twenty-one years, the inquiry arises, whether the limitation over to them is valid, and that depends upon the determination of the further question whether the absolute ownership would then vest in such children. If it would, there would be no unlawful suspension. Otherwise, it is difficult to see how the provision made for them by the will can be supported. The will does not, in terms, give the fund to the children, but directs the executors, in the events mentioned, to pay it to them. The postponement of the time of payment of a gift is not important; that alone will not qualify the absolute character of the ownership. The vesting of it is suspended if some period in the future is annexed to the substance of the gift. In the present case, the conditions upon which the right of the children to take the fund depend are to or may arise in the future, beyond the time of the death of the mother, and the contingency is uncertain. The children must reach the age of twenty-one years; and if they do not, the fact that the direction is, that the fund go to Mr. Boerum and Mrs. Vanderveer is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is therefore clear that in the case supposed, and which may arise if Mrs. Bush should leave children her surviving, the observance of the direction of the will will operate to suspend the absolute ownership of the fund for some period of time after her death: *Batsford* v. *Kebbell*, 3 Ves. 363; *Patterson* v. *Ellis*, 11 Wend.

259; *Warner* v. *Durant*, 76 N. Y. 133; *Delaney* v. *McCormack*, 88 Id. 174, 183.

Such suspension being for a time not dependent upon lives, and not more than two in being at the time of the death of the testatrix, renders the limitation over void, unless it is saved by some provision of the statute. We find none in its support. While the suspension of the absolute power of alienation of real estate may be extended beyond two lives limited, so as to embrace the period of minority of a child to whom the remainder is limited, and such suspension may be created by a contingent limitation of the fee (1 R. S., p. 723, secs. 15, 16; Id., p. 726, sec. 37), our attention is called to no statute qualifying in that or any manner the effect of the provision, before referred to, limiting the time of suspension of the absolute ownership of personal property. The consequence seems to be, that the direction of the testatrix, by her will, to pay the fund to such children in the event mentioned, or on their failure to arrive at the age of majority to pay it to Mr. Boerum and Mrs. Vanderveer, was in contravention of the statute, and void: *Manice* v. *Manice*, 43 N. Y. 303. It follows that if Mrs. Bush does not survive her husband, the testatrix will have died intestate as to that fund; or in case the power of sale is not exercised by sale of the land during her life, the intestacy may be applicable to it as real estate; and such property, either as land or personalty, will, unless given other direction in the mean time by those having contingent interest in it, go to the heirs or next of kin of the testatrix, — those who were such at the time of the death of the testatrix, — and not to those who will be such at the time the contingency occurs which produces the intestacy: 1 R. S. 751; 2 Id. 96; *Hoes* v. *Van Hoesen*, 1 Barb. Ch. 379; *In re Kane*, 2 Id. 375.

Such issue of Mrs. Bush, if she should leave any her surviving, will, therefore, have no interest in this fund or property derived from the provisions of the will; and in the event she does not survive her husband, her interest is limited to a life estate, or to the income of the fund during her life. As a consequence, then, and in that case, her brother and sister will be the only heirs and next of kin of the testatrix.

They have conveyed and transferred their unconditional and contingent interest in the property to her. By that conveyance Mrs. Bush acquired the entire beneficial interest in the property. This enabled her individually to convey it to the plaintiff. Her deed to the plaintiff had the effect to vest in

him the title to the land. Since all the parties having any beneficial interest in it or its proceeds have thus joined in and made the conveyance, there remains no occasion for the exercise of the power of sale given by the will; and upon the principle that the beneficiaries in the equitable conversion of real property into personalty may effectually elect to have a reconversion into realty and take it as land, rather than the proceeds of it, we think the exercise of such power of sale may be deemed dispensed with and defeated: Story's Eq. Jur., sec. 793; *Hetzel* v. *Barber*, 69 N. Y. 1; *Prentice* v. *Janssen*, 79 Id. 478; *Armstrong* v. *McKelvey*, 104 Id. 179.

In this case the beneficiaries are in a situation to do so, as the title of the property, treating it as land, was in those three, brother and two sisters, or some of them, and was nowhere else. There is, therefore, no intervening right of any other party to be prejudiced. The contingent and unconditional estates were united in Mrs. Bush by the conveyance to her. These views lead to the conclusion that the defendant has taken, by the conveyance to him, the title which the plaintiff undertook to convey. But as the determination is made upon a ground not presented to or considered by the court below, the plaintiff should not have costs.

The order of the general term should be reversed, and the judgment entered upon the decision of the trial court affirmed.

EQUITABLE CONVERSION. — As to the law respecting the subject of equitable conversion of real property into personalty, or *vice versa*: *Howard* v. *Peavey*, 128 Ill. 430; *ante*, p. 120, and note.

PERPETUITIES. — As to what perpetuities are forbidden in the United States of America: Extended note to *Barnum* v. *Barnum*, 90 Am. Dec. 101–106; *Mandlebaum* v. *McDonell*, 29 Mich. 78; 18 Am. Rep. 61; *Kent* v. *Dunham*, 142 Mass. 216; 56 Am. Rep. 667; *Beardsley* v. *Selectmen of Bridgeport*, 53 Conn. 489; 55 Am. Rep. 152; *Mifflin's Appeal*, 121 Pa. St. 205; 6 Am. St. Rep. 781, and note.

EXECUTORS HAVE A TWOFOLD CAPACITY, that of trustees and that of executors: Note to *Lockwood* v. *Stradley*, 12 Am. Dec. 103. Where a power of sale, given by a will to executors, of necessity implies a trust in the individuals who are named as executors, such power cannot be exercised by another than the executors themselves; but where a power is given to an executor *ratione officii*, it may be exercised by any one who may succeed to the office: *Joralemon* v. *Van Riper*, 44 N. J. Eq. 299. But in *Davis* v. *Hoover*, 112 Ind. 423, the general rule is laid down, that an administrator with a will annexed takes all the power under the will which would have devolved upon an executor, had one been named. A power of appointment cannot be delegated to another: *Hood* v. *Haden*, 82 Va. 588; compare *Warnecke* v. *Lembca*, 71 Ill. 91; 22 Am. Rep. 85. A court of equity may remove a trustee, but not an executor: *Bolles* v. *Bolles*, 44 N. J. Eq. 385.

GOODRICH *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[116 NEW YORK, 398.]

RAILROAD COMPANY USING THE CARS OF ANOTHER CORPORATION UPON ITS ROAD IS BOUND to inspect them just as it would inspect its own cars. This duty it owes as master to its servants, and it is responsible to them for the consequence of such defects as would have been discovered by ordinary inspection. This examination of the cars of other roads must be performed before they are placed in trains, or furnished to employees to be used.

EMPLOYEES OF A RAILROAD COMPANY, WHEN THE CARS OF ANOTHER RAILROAD ARE FURNISHED TO THEM FOR USE, have the right to assume that, as far as ordinary care can accomplish it, the cars are suitably equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk and danger through the negligence of their employer.

IT IS NOT THE DUTY OF THE BRAKEMEN OF A RAILROAD COMPANY TO EXAMINE CARS TO ASCERTAIN WHETHER THE COUPLING APPLIANCES are in proper condition before undertaking to make the coupling. The duty of the examination in the first instance rests on the master.

DEGREE OF VIGILANCE REQUIRED FROM A RAILWAY CORPORATION IN THE EXAMINATION OF THE CARS OF ANOTHER RAILWAY, which it furnishes to its employees for their use, to ascertain that such cars are safe, is measured by the danger to be apprehended and avoided.

BRAKEMAN OF A RAILWAY COMPANY DOES NOT ASSUME THE RISK OF BEING INJURED by the coming together of cars which he is coupling, if they could not have come together if the bumpers had been in proper condition.

CONTRIBUTORY NEGLIGENCE. — A BRAKEMAN WHO IS IN THE ACT OF COUPLING CARS, and who, when the cars are four or five feet apart, sees that the bumper of the moving car is lower than that of the stationary car, is not, as a matter of law, to be adjudged guilty of contributory negligence in attempting to make the coupling. When the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger confronting him.

ACTION to recover damages for injuries to plaintiff while a brakeman in the employ of the defendant. On October 17, 1882, plaintiff, with other employees of the defendant, was directed to take charge of a circus train which was to come upon defendant's road over the New England road. Between seven and eight o'clock in the evening, the conductor directed plaintiff to couple some of the cars of the circus train to some stationary cars on the same track. The plaintiff undertook to comply with the conductor's orders. In so doing, he stood on the east side of the track, and the cars were moving slowly. It was dark, and he had a lantern. When the cars were within a few feet of each other, and he had stepped between

them to insert the link, which was in the bumper or draw-head of the moving car, into the bumper or the draw-head of the stationary car, he observed that the bumper of the moving car was lower than that of the stationary car. He thought by raising the link it would enter the bumper of the stationary car. In this he was mistaken. The bumper of the moving car passed under that of the stationary car, and in attempting to withdraw his hand, it was caught between the dead-woods, and severely injured. The purpose of these dead-woods was to prevent the cars coming together, and to thus protect persons standing between them. The bumper on the moving car was lower than that on the stationary car, and its being so much lower was caused by a staple or strap being broken. The link in the bumper at the time of the accident was straight; after that a crooked link was used, and the coupling made.

Amasa J. Parker, for the appellant.

Hamilton Harris, for the respondent.

Brown, J. It was decided in *Gottlieb* v. *New York etc. R. R. Co.*, 100 N. Y. 462, that a railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that when cars come to it from another road, which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employees for transportation. When so furnished, the employees, whose duty it is to manage the trains, have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer. The defect complained of in this case was obvious and discernible to the most ordinary inspection, and could have been easily remedied. It is argued by the defendant that it had fulfilled its duty when it had furnished for the use of its employees crooked links, which could be used in coupling together cars upon which the bumpers were of different heights. We

do not think that in this case that fulfilled the measure of defendant's obligation. It could not be so held, unless it was the duty of the plaintiff to examine and inspect the cars to ascertain whether the coupling appliances were in proper condition. The duty of examination, like the duty of furnishing proper machinery and appliances in the first instance, rests upon the master: *Fuller* v. *Jewett*, 80 N. Y. 46; 36 Am. Rep. 575; *Gottlieb* v. *New York etc. R. R. Co.*, *supra*.

And the degree of vigilance required from a railroad corporation in this respect is measured by the danger to be apprehended and avoided: *Ellis* v. *New York etc. R. R. Co.*, 95 N. Y. 546; *Salters* v. *Delaware & H. C. Co.*, 3 Hun, 338. While in the case of corporations the performance of this duty must be committed to employees, there is no presumption that it rests upon any particular individual. It is not within the apparent scope of a brakeman's duty, and does not necessarily rest upon him. In the absence of all evidence upon the subject, we cannot, therefore, presume that the examination and inspection of the particular cars in question had been committed to the plaintiff, and unless it had, he had a right to assume that the master's duty had been performed by those having it in charge, and that the coupling appliances upon the cars were adequate to the performance of his work without extraordinary risk or danger.

It is further contended by defendant that the accident was one of the ordinary risks of plaintiff's employment, and was liable to happen in coupling any cars. Some evidence to which our attention is called, given by plaintiff on his cross-examination, standing alone, would give some color to this claim, but, read in connection with the other testimony, shows that it is only when the cars are propelled against each other with great force that the dead-woods are liable to come together, and thus endanger the brakeman making the coupling.

The evidence is, that when the moving cars are backed upon the stationary car at a slow rate of speed, or at a speed ordinarily used in making couplings, that the bumpers or draw-heads will take the whole shock, and the dead-woods will not meet, but there will be a space between them of from two to eight inches. Doubtless, the danger of injury arising from the engineer's backing the train upon the stationary car with great force is a risk which the brakemen must assume, and for which the corporation would not be responsible, but that was not the risk to which the plaintiff was exposed.

The evidence is, that the train was backing up slowly, and at a rate of speed that would not have brought the dead-woods in contact if the bumper had been in order. Because the bumper of the moving car was defective, and hung lower than it should have done, it passed under the bumper of the stationary car, and permitted the dead-woods to come together.

The defective bumper was thus shown to have been the proximate cause of the accident. It was literally the *causa causans*. Its immediate effect was to permit the dead-woods of the two cars to come together, and the plaintiff was, from that cause, exposed to a danger not within the ordinary risks of his employment.

This result was traceable directly to the defendant's failure to provide the moving car with bumpers in good order, and unless the proof showed (which it did not) that plaintiff himself was in some way responsible for that condition of the car, the negligence of the defendant was established.

The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. He testified that when the cars were four or five feet apart, he saw that the bumper of the moving car was lower than the bumper of the stationary car. It does not appear that he observed that it would pass under the bumper of the stationary car, or that there was any danger that the dead-woods would come together. On the contrary, he appears to have thought that the coupling could be made with the straight link that was in the draw-head. He had a right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error.

The court cannot affirm that, for such an error of judgment, induced as it was to some extent by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him, and whether he acted such a part, under the circumstances of this case, was for the jury to determine.

The judgment of the general term should be reversed, and a new trial granted, with costs to abide event.

MASTER AND SERVANT. — What risks are assumed by the servant: Cases collected in note to *Magee* v. *North Pac. R. R. Co.*, 12 Am. St. Rep. 75. A servant has a right to rely upon his master's inquiry, and to assume that all things are fit and suitable for the use he is directed to make of them: *Magee* v. *North P. C. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69; for the master is bound to exercise reasonable care in providing suitable machinery, safe appliances, and proper means for the performance and carrying on of his work by his servants: *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526, and note.

CONTRIBUTORY NEGLIGENCE. — Instances of what has been considered contributory negligence: *Louisville etc. R. R. Co.* v. *Hall*, 87 Ala. 708; 13 Am. St. Rep. 84, and particularly cases cited in note; *Bridger* v. *Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653, and note.

BERNHEIMER *v.* RINDSKOPF.

[116 NEW YORK, 428.]

ASSIGNMENT FOR BENEFIT OF CREDITORS — BURDEN OF PROOF. — One who attacks an assignment for the benefit of creditors as being fraudulent must assume the burden of proof, if the assignment is valid on its face.

FRAUD IN AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS WILL NOT BE PRESUMED. It must be proved, and if there is room left for an honest intention, the proof of fraud is wanting.

INDORSEMENT OF A NOTE GIVEN FOR A DEBT OF ONE OF THE PARTNERS in the firm name, which is mentioned as a preferred debt, in an assignment by the firm for the benefit of creditors, will be presumed, in an action to avoid such assignment as fraudulent, to have been made with the assent of all of the members of the firm.

INDORSEMENT OF A NOTE IN THE FIRM NAME TO SECURE A LIABILITY OF AN INDIVIDUAL PARTNER, when the firm is insolvent, is not fraudulent as against firm creditors, providing that it is done for an honest purpose, and with the consent of the members of the firm, and the indorsee did not know that the firm was insolvent.

CONSIDERATION FOR INDORSEMENT FOR PARTNERSHIP. — The surrender of a note of a partner which was then due, and the taking of a new note in place thereof, payable in one year, is a sufficient consideration to support the indorsement of the latter by the firm, and the creditors of the partnership cannot avoid, as a fraud upon them, an assignment by the firm in which the indorsed note is one of the preferred debts.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS — STATEMENT OF THE NATURE OF LIABILITY. — There is no fraudulent misstatement of the nature of liability when a note is described as having been discounted by the assignors and held by M. N., when in truth such note was indorsed by the assignors, and was in favor of M. N., and was taken by him in payment of the pre-existing debt of one of a firm consisting of the assignors.

A. Blumenstiel, for the appellants.

Nathaniel Myers, for the respondents.

BROWN, J. This action was brought by the plaintiffs, who are judgment creditors of the firm of Rindskopf Brothers & Co., to set aside a general assignment made by that firm to the defendant Jacob W. Mack, September 19, 1884, on the ground that it was made to hinder, delay, and defraud creditors.

It is alleged that this result was sought to be accomplished by preferring in the assignment numerous claims, some of which were fictitious, and for none of which the firm was liable.

The defendants introduced no evidence on the trial, and the court found as facts that none of the preferences were fictitious, or for an amount for which said firm was not justly liable, and were not made for the purpose of reserving any portion of the property for the benefit of the assignors, or for the purpose of hindering, delaying, or defrauding their creditors.

The burden of establishing by competent and sufficient testimony the allegations of the complaint rested upon the plaintiffs, and the findings of the trial court having been affirmed by the general term, the judgment must be sustained in this court, unless the evidence will admit of no other inference except that which plaintiffs claim for it.

The first and main ground upon which the assignment is assailed is, that the preference to Max Nathan for the sum of twenty-five thousand dollars, the amount of a promissory note made by James Thompson & Co., and indorsed in the name of Rindskopf Brothers & Co., is not, based on a firm liability, valid as against firm creditors. It appears that in December, 1881, upon the application of the defendant Buchman, a member of the assigning firm, and for the benefit of his daughter, Mr. Nathan loaned twenty-five thousand dollars to James Thompson & Co., and received therefor their note indorsed by Buchman, payable one year after date. This note was renewed in January, 1883, and about the time of its maturity, in 1884, Nathan refused to renew it, unless it was indorsed by the firm of Rindskopf Brothers & Co., and thereupon Mr. Buchman, in Nathan's presence, indorsed on the renewal note the name of said firm, and Nathan surrendered the old note, and accepted the renewal for one year. At that time Rindskopf Brothers & Co. were insolvent, but Nathan was not aware of that fact. The firm did not then contemplate an assignment, but hoped to be able to pay their debts in full. The plaintiffs attack the validity of the preference of this note in the assignment on three grounds: 1. That the assignors were

not liable on the note, unless all the members of the firm authorized and consented to the indorsement, and that the burden was on the defendant to establish authority in Buchman to make the indorsement; 2. That, assuming that the firm authorized the indorsement, it was, in effect, an appropriation of partnership property to the payment or the debt of an individual partner made when the firm was insolvent, and hence a fraud upon the firm creditors; 3. That there was a fraudulent misstatement in the deed of assignment of the nature of the liability of the assignors upon the note.

I shall briefly discuss these questions in the order in which they are stated.

The plaintiffs have cited a multitude of authorities to show that a holder of a note of a firm given by one partner for his private debt, or for a matter outside of the firm business, and known to be such by the holder, must, in an action upon the note against the firm, prove that the other partners who did not sign consented to be bound by the contract. Such is undoubtedly the law. Each partner is the agent of the firm only as to matters within the scope of the partnership business; and if one partner gives a partnership note for his own debt without the consent of his copartners, it is void in the hands of any party having knowledge of the purpose for which it was given. Such a note does not bind the other partners without their consent, and the burden of establishing such consent rests on the holder of the note.

The respondents do not deny these legal propositions, but they do deny their application to this action. They would be applicable, and full effect would be given to them, if Nathan was suing the firm on the note, and the firm liability was denied. But the issue here is a very different one from what it would be in an action by Nathan against the firm.

The plaintiffs, and not the firm, are here attacking the validity of the note. As between Nathan and the firm, the firm liability and the validity of the indorsement is admitted. Nathan is not called upon to prove anything. He is not a party to the suit, and is not before the court in any capacity, and cannot be heard. The issue is solely between the plaintiffs and the assignee. The attack is upon the assignee's title to the firm property, and to his right to administer upon it under the trust deed. The trust deed is alleged to be fraudulent because of the admission and direction to pay a fictitious debt. The admission of the validity of the indorsement is the fraudu-

lent act which plaintiffs claim destroys the assignee's title to the property. In substance, plaintiffs allege that the assignee is not entitled to retain the firm property and dispose of it in accordance with the terms of the assignment, for the reason that the purpose to which he is directed to apply it is a fraudulent one, and the fraud is alleged to consist in directing the payment of a debt for which the firm was not liable, and which is in fact a debt or liability of an individual member of the firm. Obviously upon such an issue the burden is upon the plaintiffs to establish their complaint. Among all the cases cited in the appellants' brief, there is not a single authority holding that in an action of this character the burden is on the assignee to prove the validity of the assignment, or the liability of the firm for the debts the assignee is directed to pay. None, I think, can be found. The assignment is valid upon its face, and the presumption as to its entire validity must prevail until the contrary appears by evidence; and in this action an inference cannot be drawn that the firm are not liable on the note from proof of the fact that it does not represent a firm debt, because *non constat* it may have been indorsed with the consent and by direction of all the members of the firm, and that fact must be negatived before the assignee is put upon his defense. In the absence of all evidence on that question, the only proof before the court was the acknowledgment of the debt in the assignment, and the presumption of the validity of that instrument required the court to assume the consent of the firm to the indorsement. Fraud cannot be presumed. It must be proven, and if there is left room for the inference of an honest intent, the proof of fraud is wanting: *Shultz* v. *Hoagland*, 85 N. Y. 469; *Baird* v. *Mayor etc.*, 96 Id. 567; *Kingsley* v. *City of Brooklyn*, 78 Id. 215; *Bank of Silver Creek* v. *Talcott*, 22 Barb. 550; *Crook* v. *Rindskopf*, 105 N. Y. 476.

The evidence on this branch of the case, so far from affording the appellants ground for an exception, would not have sustained a finding that the indorsement was without the firm consent. On that question the plaintiffs introduced no evidence.

But it is argued the note may have been indorsed with the consent of all the partners, and be a valid contract between them and the holder; still as it was made when the firm was insolvent, and to secure a liability of an individual partner, it is in law fraudulent against the firm creditors. *Menagh* v. *Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, is the principal au-

thority cited to sustain this claim. That action was one for the conversion of property against the sheriff of Ontario County, and arose out of sales of firm property under executions in favor of firm creditors. The plaintiff made title to four fifths of the property through a sale of the interest of two of the partners under chattel mortgages given by said partners to their individual creditors when the firm was insolvent. Before the executions were issued to the sheriff, the remaining partner sold and transferred his interest in the firm property to a person not a member of the firm. The plaintiff had judgment, which was affirmed at the general term. It was sought in this court to sustain the judgment on the theory that as the equities of firm creditors can only be worked out against firm property through the equities of the partners, that, as all the members of the firm had severally conveyed to different persons their respective interests in the firm property before the levy by the sheriff, the equities of the partners to have the property applied to pay firm debts had been released or waived, and with them had gone the equity of the creditors that was dependent upon them, and consequently the purchaser from the individual partners had become vested with the *corpus* of the property. This claim was asserted on the authority of *Coover's Appeal*, 29 Pa. St. 9; 70 Am. Dec. 149. The absurd results which would follow such a rule were shown by the opinions of judges Rapallo and Allen, and this court held that the purchaser took only the interests of each partner after the firm debts were paid and the equities between the partners adjusted, and that the *corpus* of the property, notwithstanding the transfer by the several partners of their individual interest, still remained firm property, and subject to levy on execution against it by firm creditors. In that case the firm were not liable to the mortgagees, through whom plaintiff made her title, and there was no transfer of firm property to pay a debt of the firm; and it is not an authority in a case where the firm has made itself liable for the debt which the firm property was appropriated to pay.

The rule that it is a fraud upon firm creditors for a member of a firm to take firm property, and apply it to his individual debt, or for an insolvent firm to apply firm property to the payment of the debt of any individual partner, is well settled: *Ransom* v. *Van Deventer*, 41 Barb. 307; *Wilson* v. *Robertson*, 21 N. Y. 587.

But the question here is, Do the facts bring this case, con-

clusively, within that rule? There is no principle of law which forbids a partnership from entering into obligations outside of the scope of the partnership business, provided it is done with an honest purpose, and with the consent of all the members of the firm. And partnership property may be transferred to pay a joint debt for which the firm is liable, outside of the partnership business, and the joint creditors will obtain a good title to the property: *Saunders* v. *Reilly*, 105 N. Y. 12–18; 59 Am. Rep. 472. And when there is a good consideration to support a contract of the firm, outside of the scope of the firm business, I take it, a firm creditor having no lien upon the firm property has no legal ground for complaint if firm property is appropriated to pay such obligation, even though the firm was insolvent at the time it entered into the contract. The contract being legal, and there being no actual fraud, it may be enforced against the firm, and hence it is not fraudulent, in law, if firm property is applied to pay the debt. We must, in considering this branch of the case, assume the firm to be liable on the note when the assignment was made; and we are thus brought to the question whether the proof as to the circumstances under which that liability was contracted was such as to establish, against firm creditors, fraud, either in law or in fact. If the proof had shown that Nathan knew of the insolvency of the firm, at the time he renewed the note, and that an assignment was then impending, or had there been no consideration for the indorsement, a different conclusion would have been permitted. But there was no evidence that Nathan knew the firm was insolvent, and it appeared that, upon accepting the renewal note, he surrendered the old note and extended the time for the payment of the debt for one year. This made him a holder for value, and constituted a good consideration for the new note: *National Bank* v. *Place*, 86 N. Y. 444.

In *Menagh* v. *Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, and all kindred cases, there was, substantially, a donation of firm property to pay the debt of an individual partner, without any consideration moving to the firm. Here there was a consideration; and in this very essential fact the case under consideration differs from all the cases cited by the appellants in which the principle cited has been applied. All of them are cases where the assignment itself preferred debts of individual partners, or where the property was transferred directly to pay individual debts. The conclusion that indorsing the note

was fraudulent in law, as against the creditors of the firm, is not therefore permitted.

It further appeared that the business relations between Rindskopf Brothers & Co. and Thompson & Co. were more or less intimate, and we cannot say that the assignors did not receive a benefit from the renewal of the note and the extension of the payment of the debt for a year. The failure of Thompson & Co. and of Buchman to pay the note in question might have precipitated the failure of Rindskopf Brothers & Co., which the evidence shows they, at that time, hoped to avoid. The trial court was entitled to give weight to such considerations in determining the intent of the assignors, and the evidence was sufficient to negative the inference of a fraudulent purpose on their part in making the indorsement. I think, therefore, the exception to the findings of the court, that the preference of the Thompson note was for a debt for which the firm was justly liable, and was not fraudulent, and to the refusal to find that the firm received no consideration for such indorsement, cannot be sustained. Nor is the objection well taken that there was a fraudulent misstatement of the nature of the liability on the indorsement of the note.

The preference in the assignment was as follows:—

"Max Nathan of said city of New York. For the sum of $99,900.86; . . . $25,000 thereof for the amount of a certain promissory note for that amount made by the firm of James Thompson & Co., dated January 21, 1884, payable twelve months after its said date, indorsed by said assignors, and discounted by and held by said Max Nathan."

Criticism is made upon the word "discounted," and that the direction to pay is absolute, whereas the liability was contingent. There is no attempt made to make it appear that the note was for the accommodation of the assignors, and the statement of the liability was not calculated to mislead. On the face of the note, Thompson & Co. were the real debtors, and, upon payment, the assignee would be entitled to take and enforce the note against that firm.

Numerous other preferences in the assignment are claimed to be fraudulent, and at considerable length and with great earnestness have been pressed upon the attention of the court by the learned counsel for the appellants. The questions presented are mainly ones of fact. We have considered them all fully, but find nothing which would justify the reversal of the judgment.

Upon those matters we concur in the opinion of the learned judge who heard the case at special term.

The judgment should be affirmed, with costs.

FRAUD. — AS TO THE BURDEN OF PROOF in fraudulent conveyances, and in cases of fraud generally: Note to *Brown* v. *Mitchell*, 11 Am. St. Rep. 758. Where an assignment for the benefit of creditors is sought to be impeached as fraudulent, the burden is upon the assailants to prove the fraud: *Jackson* v. *Harby*, 70 Tex. 410; *In re Harris*, 81 Cal. 350. But an assignment or transfer of property by a debtor to his creditor, not made in the usual and ordinary course of business, is *prima facie* fraudulent: *Godfrey* v. *Miller*, 80 Id. 420; *Washburn* v. *Huntington*, 78 Id. 573.

HYMES *v.* ESTEY.

[116 NEW YORK, 501.]

COVENANT OF WARRANTY, PUBLIC EASEMENT WHEN NOT A BREACH OF. — The fact that part of the land conveyed with a covenant of warranty was, at the time of the conveyance, a highway, and used as such, is not a breach of such covenant, because the grantee is presumed to have known of the existence of the public easement, and to have purchased upon a consideration in reference to the situation in that respect.

COVENANT OF WARRANTY, PUBLIC EASEMENT WHEN A BREACH OF. — The existence of a public easement, such as a right of way for a public street, when the grantee has no notice of the right to such easement, and there was no indication of a highway or street on the property at the time of his purchase, is a breach of a covenant of warranty.

RES JUDICATA. — A finding that a piece of land had been dedicated, accepted, used, and occupied as a public street more than twenty years before the commencement of the action, is not conclusive against the defendant in a subsequent action that, at the time he purchased such land, and within such twenty years, he had notice of the existence of such street, or that its use was so notorious that he must be deemed to have notice of it.

F. E. Tibbetts and J. H. Jennings, for the appellant.

D. C. Bouton, for the respondents.

BRADLEY, J. The action was brought for an alleged breach of covenant of warranty, commonly known as covenant for quiet enjoyment, in a deed made by the defendant's testator conveying to Byron A. Todd, lot 1, in block 80, in the village of Ithaca, and which the latter by deed, with like covenant, afterwards conveyed to the plaintiff. The alleged breach was the eviction of the plaintiff, by the village of Ithaca, from a portion of the lot which had, before such conveyance to Todd, been appropriated as a part of a public street. The trial

court held that no breach resulted from such appropriation and eviction, and nonsuited the plaintiff. It must be deemed the settled doctrine in this state that the fact that part of land conveyed with covenant of warranty was, at the time of conveyance, a highway, and used as such, is not a breach of the covenant. This is so, for the reason that the grantee must be presumed to have known of the existence of the public easement, and purchased upon a consideration in reference to the situation in that respect: *Whitbeck* v. *Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Huyck* v. *Andrews*, 113 N. Y. 85; 10 Am. St. Rep. 432. And such is the rule in Pennsylvania: *Patterson* v. *Arthurs*, 9 Watts, 152; *Wilson* v. *Cochran*, 46 Pa. St. 229.

But it is contended, on the part of the plaintiff, that such presumption did not arise in this instance, because there was, at the time of the purchase by his grantor, or by him, no indication of a street upon the lot; and that the court erred in refusing to submit to the jury the question whether, at the time of the purchase of Todd from Estey, the strip of land in question was actually and so obstructed as to preclude the presumption of any public easement there; and whether there was then, or at the time of the plaintiff's purchase, any indication of a public street there; also, whether the plaintiff had notice, either actual or constructive, of the public easement; and whether the land in question was embraced in the conveyance of Estey to Todd. The defendant's testator took title by deed in September, 1847, and conveyed May 1, 1869, to Todd, who made the conveyance to the plaintiff in August, 1876.

The conclusion was warranted by the evidence that neither Todd or the plaintiff had any knowledge, at the time of the purchases by them, respectively, of the existence of any street, or of the right in the public to one, upon the lot. That fact of itself is probably not important if the situation was such as to indicate it. This lot is bounded on the east by Tioga Street, and it is claimed, and there is some evidence tending to prove, that the northeast corner of the lot extended to, or very near to, Cascadilla Creek, which runs northwesterly. The complaint is, that the plaintiff was evicted from twelve and a half feet in width at that corner next to the creek. There is evidence tending to prove that, in 1848, Estey caused three oak piles to be driven in the creek at this corner, and that he then claimed to own the land to where the piles were placed; that when Todd purchased, Estey claimed that the northeast corner of

the lot went into the creek; that there was then no indication of a highway or street there, but that the fence extended to within two feet of the creek, at which point was located the fence-post, and that the post and the fence there had the appearance of having been standing a long time; that the situation was not changed any at the time of the plaintiff's purchase, except that the north panel of the fence had been taken out simply to enable the occupant of the lot to pass from Tioga Street to a barn erected on the back end of the lot, and that there were some other apparent obstructions, further down the creek, to the use of its bank as a public street.

In 1881, the village of Ithaca commenced an action against the plaintiff to enjoin him from maintaining, as he persisted in doing, a fence at the northeast corner of the lot extending near to the creek, and that action resulted in a judgment perpetually restraining him from maintaining a fence nearer than twelve and a half feet from the creek, which space was determined to be within a public street extending along the southerly bank of the creek from Tioga Street on the east down the creek to Sears Street. And, from the record in that action, it appears that a strip of land there, twelve and a half feet in width, had been dedicated to the public use as a street more than twenty years before the controversy between the parties to that action arose.

Upon this state of facts arises the question whether it was properly held, as matter of law, that the conveyance must, in effect, be deemed to have been made to Todd or to the plaintiff subject to the public easement, although the conclusion of fact was permitted that they severally purchased without any notice of it, and that there was then no indication of any street on the premises. To so hold is going further than did the court in *Whitbeck* v. *Cook*, *supra*. There it was properly assumed that the highway was in use, as such, and may have been seen by the purchaser, that he must be presumed to have known of its existence, and therefore purchased in reference to it. Such were, substantially, the views of the court in *Wilson* v. *Cochran*, *supra*. And in *Patterson* v. *Arthurs*, *supra*, Mr. Justice Kennedy, in delivering the opinion of the court, said that "it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it, and made himself acquainted with its locality, and the state and condition of it, and consequently, if there be a public road or highway open or in use upon it, he must be taken to have seen

it, and to have fixed in his own mind the price that he was willing to give for the land with reference to the road." In the later case in that state, of *People's Savings Bank* v. *Alexander*, Pennsylvania, April, 1886, it was held that the fact that a street had been lawfully laid out and not opened was such a defect in the title which the vendor had undertaken to convey as to relieve the purchaser from the obligation to perform his executory contract of purchase. The only other case in our state, referring to the subject, to which our attention has been called, is *Rea* v. *Minkler*, 5 Lans. 196, where it was held that the existence of a private way on the premises, conveyed with warranty, constituted a breach of the covenant. And there Mr. Justice Miller, after citing the Whitbeck case, and assuming that it went to the extent of holding that a highway in existence at the time of the sale, and for a long time previously, is not a breach of a covenant of warranty, he thought there was a broad distinction between a public and private right of way, and added: "While the latter might be unknown to a purchaser, the former, running through a farm, would be seen when purchased."

So far as relates to a private right of way, this is supported by *Huyck* v. *Andrews*, *supra*. The exemption of the easement of the public in a highway from the operation of the covenant of warranty evidently rests upon the presumption arising from the opportunity furnished to the purchaser by its apparent existence or use to take notice of it, and when that is the situation, the purchaser is charged with knowledge of it. But when no such opportunity exists, and no means of notice of the existence of the right to a public easement is open to observation upon the premises, there is no well-founded reason to support the proposition that the subsequent appropriation by the public, in the exercise of such pre-existing right of a portion of the land conveyed, is exempt from the operation of the covenant of warranty. In such case, it cannot be said that the purchaser, without notice of the existing burden upon the land, has taken title in reference to it, or that he gets all the proprietary right in the premises which he is permitted to assume was assured to him by the covenant of his grantor.

That is within it which, in view of the apparent situation, the deed purports to convey: *Mott* v. *Palmer*, 1 N. Y. 564. It would not include the public easement in an open, visible highway or street.

From these views it follows that the trial court should have

submitted to the jury the propositions as requested, and that the direction of the nonsuit was error, unless the plaintiff was concluded upon those questions by the judgment record in the former action. It there appears that the court found that, more than twenty years prior to the time that cause of action arose against the defendant therein (plaintiff here), the strip of land was dedicated by the owner to the public use as a street; that it "was thereupon accepted, improved, and maintained as a public street by said village, and has been used, occupied, and maintained as a public street or passage-way for persons and teams for the period of more than twenty-five years last past." The judgment entered upon the decision, perpetually enjoining the defendant in that action from obstructing the passage by the public over that strip of land, was conclusive upon him and his privies as to the matters determined, and as to all matters which the parties may have legitimately litigated and had determined in that action: *Jordan* v. *Van Epps*, 85 N. Y. 427; *Pray* v. *Hegeman*, 98 Id. 351; *Bell* v. *Merrifield*, 109 Id. 203; 4 Am. St. Rep. 436. But a judgment is *res adjudicata* as to those matters only which are within the subject-matter of the litigation, and those which, as incidental to or essentially connected with it, might legitimately have been litigated in the action.

The question, and the only issue necessarily involved in the former action, was, whether there was in the public the right to the strip of land as and for a street, and when the existence of such easement was determined, the purpose of the action was accomplished. To that extent the adjudication is conclusive upon the plaintiff. But whether the place was used as a street, or open or visible as such, at the time of the sale by Estey to Todd, was not, so far as appears, legitimately within the purview of that action, or essentially for any purpose involved in its determination. That fact, therefore, was not material to that controversy, and for that reason the plaintiff in this action for breach of covenant is not concluded by any expressions in that respect in the findings of the court in the former action: *People* v. *Johnson*, 38 N. Y. 63; 97 Am. Dec. 770; *Sweet* v. *Tuttle*, 14 N. Y. 465; *Woodgate* v. *Fleet*, 44 Id. 1; *Stowell* v. *Chamberlain*, 60 Id. 272; *Belden* v. *State*, 103 Id. 1; *Cromwell* v. *County of Sac*, 94 U. S. 351.

In the view taken, this action and its purpose may be consistent with the existence in the public of the right which the village of Ithaca in the former action sought to have deter-

mined. It does not appear that such right was dependent upon continuous user by the public. Nor can it be assumed, from what appears by the record before us, that such user was essential to render the dedication and acceptance effectual to support the public easement.

No other question seems to require consideration.

The judgment should be reversed, and a new trial granted, costs to abide the event.

COVENANT AGAINST ENCUMBRANCES IS BROKEN by the existence of any kind of outstanding easement other than a public highway: *Huyck* v. *Andrews*, 113 N. Y. 81; 10 Am. St. Rep. 432, and cases cited in note as to whether easements are breaches of covenants against encumbrances.

RES ADJUDICATA. — As to what matters former judgments are conclusive, see note to *Gould* v. *Sternberg*, 128 Ill. 510; *ante*, p. 138.

SCHEU *v.* BENEDICT.

[116 NEW YORK, 510.]

COMMON CARRIER. — Delivery of goods, at the place designated, in good condition, is necessary to relieve a common carrier from liability as such; and if the consignee, after due notice, refuses or neglects to receive them, the carrier may relieve himself from responsibility by placing them in a warehouse for or on account of the consignee; but so long as the carrier has the custody, the duty devolves upon him to take care of the property and preserve it from injury.

COMMON CARRIER, LIABILITY, HOW LONG CONTINUES. — Though goods arrive at their place of destination, of which the consignee has notice, and they are put at his disposal to be taken away, and though he does take part of them, he has a reasonable time to remove the residue, and the carrier remains answerable for the goods until they are delivered in some form or another. So held where a cargo of malt was partly removed by its consignee on the day of its arrival, and the balance, not being removed for seven days, was then found to be injured from dampness, and where the jury had by their verdict found that the consignee had not been guilty of unreasonable delay under the circumstances of the case in not sooner removing such balance.

G. W. Bower, for the appellants.

James M. Humphrey, for the respondent.

HAIGHT, J. This action was brought to recover damages alleged to have been sustained by reason of a cargo of malt becoming damp and wet. The defendants were common carriers of freight upon the Erie Canal and Hudson River, and as such owned and ran the canal-boat W. W. Beebe. On the sixteenth day of June, 1882, they received from the plaintiff

thirteen thousand bushels of Canada barley malt, in good order, to be transported to the city of New York. Thereafter, and on the twenty-ninth day of June, the cargo arrived, and notice was given to the consignees of such arrival, who immediately, and on the same day, commenced to unload the same, taking out two thousand four hundred bushels. At the usual hour the men stopped work, and did not appear again to continue the unloading of the cargo until the sixth day of July, being the seventh day after breaking bulk. It was then found that the malt had been injured by water, and the consignees refused to receive it.

The bill of lading provided that the consignees should have five week-days, regardless of weather, in which to discharge the cargo without liability for demurrage. In discharging the cargo the malt had to be shoveled into bags and taken and carted away.

Upon the trial, questions arose as to whether the grain was received in good order, and as to whether it was damaged upon the voyage or after it arrived in New York, all of which we must regard as settled by the verdict of the jury.

In submitting the case, the court was requested by the defendant to charge that "if the jury should find that the carriers offered to deliver the cargo after its arrival in New York, and, receiving instructions as to its disposal, proceeded in pursuance thereof to a place designated, and commenced to discharge the cargo, then the mere liability as common carrier ceased after a reasonable time had elapsed to unload." This request was refused under the circumstances of the case, and an exception was taken. The court had instructed the jury that the consignees were entitled to a reasonable time in which to discharge the cargo, and that the jury were the judges as to what was a reasonable time, which must be determined under all of the circumstances of the case; that the defendants were responsible for the cargo until it was delivered in some form or another; that the mere putting of it at the disposal of the plaintiff's agent to take out the cargo did not relieve the defendants of their responsibility to take care of it while it lay in the harbor of New York, and was not yet taken out of the boat, and until it was removed either by the plaintiff or defendants they were liable for the proper condition of the cargo; and that if it was damaged by rain whilst lying in New York, the defendants were liable. Exceptions were taken to these charges, and also to the refusal of the court to charge that

"after bulk had been broken and part of it removed, and after a reasonable time had then elapsed to unload or remove the remainder of the cargo, the liability of the carrier, as such, ceased." It does not appear to us that these charges, when read and considered together, present any ground for error which calls for a reversal of the judgment.

The rule, doubtless, is, that the common carrier of freight by boat must, in order to relieve himself from liability, deliver the goods at the place designated in good condition. Undoubtedly there may be a constructive delivery which would terminate his responsibility as a carrier, but it must be such as would in law be recognized as a delivery. If the consignee neglect to accept or to receive the goods, the carrier is not thereby justified in abandoning them or in negligently exposing them to injury. If they are not accepted and received when notice is given of their arrival, he may relieve himself from responsibility by placing the goods in a warehouse for and on account of the consignee, but so long as he has the custody a duty devolves upon him to take care of the property and preserve it from injury: *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170–182; 6 Am. St. Rep. 350; *Hathorn* v. *Ely*, 28 N. Y. 78; *Fisk* v. *Newton*, 1 Denio, 45; 43 Am. Dec. 649; *Price* v. *Powell*, 3 N. Y. 322; *Fenner* v. *Buffalo etc. R. R. Co.*, 44 Id. 505; 4 Am. Rep. 709.

As to whether or not the consignees proceeded with reasonable diligence to unload the cargo was, as the trial court stated, a question, under the circumstances of the case, for the jury. In order to remove the malt from the boat, it had to be bagged and carted away. Whether this could be done with safety, in a rainy day, was a question of fact. It appears that Sunday and one holiday had intervened, and that one or two days had been rainy, so that we think a finding that the consignees had not unreasonably delayed the unloading of the boat is justified by the evidence. On the sixth day of July, as we have seen, the cargo was found so damp as to cause it to be rejected by the inspector of the parties. The consignees had the right to have the malt inspected as it was taken from the boat before accepting it. The entire cargo could not well be inspected at the same time, for that which was on top may have been dry and in good order, whilst that in the bottom of the boat might have been wet and spoiled. The inspector stood by and examined it as it was taken from the boat, and it was only such as passed his inspection that was accepted by the consignees.

That which remained in the boat at the close of work on the twenty-ninth day of June remained in the custody and possession of the defendants, whose duty it was to exercise ordinary care to preserve and protect it from injury, and to allow the consignees a reasonable time within which to inspect it and take it away, and in case they neglected to receive or take it within such time, then it was the duty of the defendants to discharge it in store or warehouse where it would still be protected from the elements.

It consequently appears to us that the defendants have no ground of complaint as to the charges made, and that the judgment should be affirmed, with costs.

CARRIERS OF GOODS. — The liability of a carrier of goods extends from the time of receiving the goods for carriage until they are delivered to the consignee at the point of destination: *Missouri etc. R. R. Co.* v. *Haynes*, 72 Tex. 175. As to what is a delivery sufficient to terminate the liability of a carrier of goods: *Tarbell* v. *Royal Exch. Ship. Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350, and particularly note; cases cited in note to *Merchants' D. & T. Co.* v. *Moore*, 30 Am. Rep. 543. And where the consignee of goods refuses to receive them, the carrier must store them for a reasonable time: *Rankin* v. *Memphis etc. Packet Co.*, 9 Heisk. 564; 24 Am. Rep. 339; but the carrier must give the consignee notice of the arrival of the goods, and allow him due time to take possession thereof: *McAndrew* v. *Whitlock*, 52 N. Y. 40; 11 Am. Rep. 657.

In Alabama, the rule is settled that a carrier's liability continues after the goods have been carried to the place of destination and stored in the depot, until the consignee has been notified of their arrival, and been allowed a reasonable time to remove them, from which time the carrier is responsible merely as a warehouseman: *Western R'y Co.* v. *Little*, 86 Ala. 159.

In the case of *Union P. R'y Co.* v. *Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183, it was decided that if the owner of goods shipped them over a carrier's railroad, and permitted them to remain at the depot at the point of destination for an unreasonable time, the liability of the carrier as such terminated, and it was responsible merely as a warehouseman. And to the same effect is *Missouri etc. R. R. Co.* v. *Haynes*, 72 Tex. 175.

In the case of *Merchants' D. & T. Co.* v. *Moore*, 88 Ill. 136, 30 Am. Rep. 541, where a carrier carried goods to their destination, where they arrived late at night, and stored them in a secure warehouse, which was burned down next morning without any fault upon the part of the carrier, he was not responsible for the goods, even though he had given no notice to the consignee of their arrival. Nor can a carrier by water be held responsible for the loss of goods delivered at the proper landing-place, although there was no warehouse there, and he gave the consignee no notice of the arrival of the goods, provided such delivery was the uniform usage; and it makes no difference that neither the shipper nor the consignee knew of such usage: *Turner* v. *Huff*, 46 Ark. 222; 55 Am. Rep. 580. There being no actual delivery of goods by a carrier to the consignee, a constructive delivery can only be effected by an agreement on the part of the carrier, either express or implied, to hold the goods for the

consignee as his agent, not as carrier: *Farrell* v. *Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760.

Where it was the custom for railroad companies to deliver grain for the consignee to one of the public warehouses or elevators in a certain city immediately upon the inspection thereof by the public grain-inspector, and the amount of freight charges was determined by the state weigh-master, who weighed grain at such elevator, who reported to the elevator company, who reported both to the consignee and the railroad company, and the railroad company then made out its freight bill, and presented it to the consignee, and upon payment thereof, made out to him a receipt, and notified the elevator company of the payment of freight charges, whereupon the elevator company issued a warehouse receipt to the consignee, in a case where grain arrived over defendant's line of railroad consigned to plaintiffs, was inspected upon November 25th and 26th, weighed by the state weigh-master, and stored by the company on the 26th in a public warehouse for the benefit of the plaintiffs as consignees, according to the usual custom in such cases, and on November 27th the elevator company notified plaintiffs that the grain had been placed to their credit, accompanied with a report of the weight, and the grain was afterwards, on the same day, November 27th, accidentally destroyed by fire, without the fault of either plaintiff or defendant, the liability of the defendant as a carrier had terminated prior to the loss of the grain by fire, even though it did not present and demand payment of its freight bill until November 29th, two days subsequent to the fire: *Arthur* v. *St. Paul etc. R. R. Co.*, 38 Minn. 95.

DARROW *v.* FAMILY FUND SOCIETY.

[116 NEW YORK, 537.]

MUTUAL ASSURANCE ASSOCIATION, REMEDY WHEN IT FAILS TO COLLECT ASSESSMENT FOR THE DEATH FUND. — If a mutual assurance association issues a policy to one of its members whereby it agrees to pay, on his death, the amount therein named "from the death fund of the association at the time of such death," and if the contract further provides that whenever the death fund is insufficient to meet existing claims, "a call shall be made upon this entire class of membership in force," and the association, after due notice of death, neglects to make the call necessary to produce the death fund required, an action may be sustained against it for the amount of a policy without first resorting to proceedings in equity to compel the levying of a call or assessment. This latter remedy is cumulative merely, and the association cannot successfully urge its own lack of duty in not making a call as a defense to an action brought upon its policy.

LIFE INSURANCE. — SUICIDE OF ONE WHOSE LIFE IS INSURED CONSTITUTES NO DEFENSE to an action on the policy of insurance, unless it comes within some condition of the contract of insurance relieving the insurer from liability in such a case.

CRIMINAL LAW. — SUICIDE WAS A CRIME at the common law, but it is not a crime by the laws of the state of New York, though an attempt to commit it is.

LIFE INSURANCE. — SUICIDE OF AN ASSURED DOES NOT RELIEVE FROM LIABILITY the company which has insured his life, and has issued a policy

which provided that it was "to be void if the member herein shall die in consequence of a duel, or by the hands of justice, or of any violation of or attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be," when by the law of the state wherein the assured dies an attempt to commit suicide is not a crime if successful.

LIFE INSURANCE. — CONSTRUCTION OF POLICY OF INSURANCE must always be in favor of upholding the contract, and no construction working a forfeiture will be given if any other is permissible from the language used.

ACTION on a policy of insurance and certificate of membership, issued upon the life of James Darrow.

George Wilcox, for the appellant.

Edgar T. Brackett, for the respondent.

BRADLEY, J. The defendant is an insurance association organized pursuant to chapter 175 of the Laws of 1883. On January 14, 1885, James H. Darrow was admitted as a member of the association by a certificate and policy or undertaking, whereby, upon the terms and conditions mentioned in it, the defendant bound itself to pay to the plaintiff, within sixty days after the requisite proof of death of such member, five thousand dollars "from the death fund of the society at the time of said death," as in the policy "mentioned and provided." This member died in December, 1885. The defendant denies its liability to the plaintiff; and one of the alleged defenses is, that the money in its death fund, at the time of the death of Darrow, was not sufficient to pay the claim. By the contract it is provided that, whenever the death fund is insufficient to meet the existing claims by death, "a call shall be made upon this entire class of membership in force," in the manner provided "for a mortuary payment as per mortuary rates" referred to, "but not more than one call shall be made to meet one death"; and that eighty per cent of the net amount received from the call shall be deposited in a bank, and be used for payment of death claims only, and the remaining twenty per cent shall be set apart as a reserve fund to meet any contingency that may arise by reason of extra mortality; and that such reserve fund so accumulated shall, at the time and in the manner mentioned, be apportioned, and the surviving members credited with it.

The members pay an admission fee and annual dues, which produce a fund for expenses, but the death fund is supplied by assessment calls upon the members, and they are required

to pay within thirty days from the date of the notice or call for payment. Thus the association is enabled to make collections, after the death of a member, in time to meet the engagement assumed by the contract, by which it may take sixty days to pay the beneficiary.

It is contended by the counsel for the defendant that its liability in an action at law upon its contract is dependent upon money being in the death fund applicable to the payment of the claim, and that the extent of such liability, within the stipulated sum, is measured by the amount in that fund so applicable at the time of the death of the member on account of whose death the beneficiary seeks to recover. It is further argued that if the association fail to make the call, by way of assessment of the members, to supply the death fund to meet the demand upon it, the remedy of the beneficiary is in equity to require the defendant to proceed to make the assessment.

While the promise to pay was to do so from the death fund at the time of the death of the member, the defendant also, by the same contract, undertook to make the call upon the members if that fund then was insufficient to meet the claim. The reasonable construction of these provisions, in view of the apparent purpose of the contract, is, that the association should pay the amount to which the beneficiary might be entitled, and that it be paid from the death fund if that is sufficient at the time of death, and if not, the amount should be produced through the means provided for assessment of the members for the purpose.

This is the duty of the defendant when the beneficiary is entitled to payment, and it arises upon the proper information of the death of the member. This duty is the contract undertaking of the defendant, supported by the power without any order or direction of the court, to enable it to perform its promise to pay. Its purpose is to supply the means to do so. And there is no well-founded reason to support the claim that the sole remedy of a beneficiary entitled to payment is in a court of equity to compel the society to make the call upon the members. The only method by which the defendant can supply itself with the means of performing its engagements to pay death claims is by assessment. And it is within the contemplation of the parties, as represented by the provisions of the contract, that the instrumentalities furnished will be employed by the association to enable it to do so. And it can-

not rely upon its failure to perform its plain duty in that respect to defeat a recovery. In this case, for reasons which will be referred to, the defendant did not intend to pay the claim in question, or any portion of it, and, therefore, as is evident, purposely omitted to exercise the means provided to raise the money to pay the plaintiff. What has already been said tends to some extent to meet the contention that a death claim is payable out of a particular fund, designated as the death fund, and that upon it depends the amount of recovery. The principle sought to be applied in support of that proposition is not applicable to the extent essential to its availability as a defense. The plaintiff in the complaint alleges that "the defendant has a sum sufficient, in its death fund, to pay the said sum so due to the plaintiff, or if it has not, has members enough liable to call for assessment to pay the same to the plaintiff in full." And it clearly appeared by the evidence that a single assessment of the members liable to call at the time of the death of Darrow, on account of this claim, at the mortuary rates prescribed, would have produced a sum in excess of the amount which the defendant undertook, by the policy, to pay the plaintiff. And it must be assumed in this case (as nothing appears to the contrary) that the collection, through the means provided, of the requisite amount, was dependent on no contingency, and therefore the funds were and are at the command of the defendant to make the payment. The assertion of the defendant, that it has not sufficient funds applicable to that purpose in hand to do so, is found upon its failure to perform the duty imposed upon it by the contract, and which it undertook to perform, provided the plaintiff's alleged claim, resulting from the death of a member, was valid.

It was alleged as a defense, and the defendant offered to prove on the trial, that the member, Darrow, died from the effects of poison taken by him, and which was administered by himself with intent to take his own life. The evidence was excluded, and exception taken. The fact that he committed suicide was no defense, unless it came within some condition of the contract of insurance relieving the defendant from liability in such case: *Fitch* v. *American P. L. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

The provision relied upon to support the defense so alleged is the provision in the contract that it should "be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of or attempt to violate any

criminal law of the United States, or of any state or country in which the member herein named may be." The death of Darrow was in this state. At common law, suicide was a crime, and the consequence was the forfeiture of the chattels, real and personal, of the *felo de se:* 4 Bla. Com. 190. It is not a crime in this state: Pen. Code, secs. 2, 173. The attempt to commit suicide is made a crime by the statute, which provides that "a person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide": Id., sec. 174; "and is guilty of a felony punishable by imprisonment," etc.: Id., sec. 178. While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not. It is with much force urged, on the part of the defendant, that the criminally unlawful attempt preceded the death, and that it was no less a violation of law because such was the result or consequence of it; that whether successful or unsuccessful, there was an attempt within the statute. Although that may be so in some sense, in common parlance an attempt to commit crime imports a purpose, not fully accomplished, to commit it. It is the attempt to commit suicide that is the crime, while the taking one's own life is no violation of the criminal law. The attempt, in such case, to commit crime would be merely an unaccomplished purpose to attempt suicide, and, therefore, the peculiarity of the offense referred to is such that it cannot come within the provision of the statute that "a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharge the jury, and directs the defendant to be tried for the crime itself": Id., sec. 685. As the attempt to commit suicide is the only crime involved in the purpose and act of a party having in view the taking his own life, it is not seen how there can in the law be recognized an attempt to commit the crime; for whatever may be done with the intent and purpose of suicide is involved in the attempt to do it, and thus constitutes an ingredient of the main and only offense.

It must, for the purpose of the question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose. The result of his act, influenced by such intent, then, was his death. By the act of

taking his own life, he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fails to accomplish its purpose, it constitutes an attempt; but if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt. The common acceptation of terms used, and which do not necessarily have a technical meaning, is entitled to some consideration in the construction of contracts, where the intention of the parties is sought for, as it must be, in the language employed. For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer: *McMaster* v. *Insurance Co. of North America*, 55 N. Y. 222; 14 Am. Rep. 239; *Dilleber* v. *Home Life Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182. When its terms permit more than one construction, that one will be adopted which supports its validity: *Coyne* v. *Weaver*, 84 N. Y. 386. And it is only when no other is permissible by the language used that a construction which works a forfeiture will be given to such an instrument: *Hitchcock* v. *North Western Ins. Co.*, 26 Id. 69; *Griffey* v. *New York C. Ins. Co.*, 100 Id. 417; 53 Am. Rep. 202.

The reason assigned for such rule of construction is, that the insurer is supposed to have chosen the language to express the terms of the contract; and it has become a rule of law that if it be left in doubt whether words of the contract "were used in an enlarged or a restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee": *Hoffman* v. *Ætna Fire Ins. Co.*, 32 N. Y. 405, 413; 88 Am. Dec. 337. There is nothing in the language of the policy to indicate that the defendant had reason to suppose that the promisee understood that suicide of the member came within its terms. And words may easily have been employed to embrace it within a condition, if it had been in the contemplation of the defendant as an act of forfeiture of the claim of the beneficiary upon the contract. Inasmuch as suicide is not a violation of the criminal law, the words do not necessarily or clearly import that the act which produces it is within the provision in question, or that it was within the intention of the defendant. And that is a sufficient reason why they should not be extended, or their meaning refined by interpretation, with a view to treat the act causing death as

within the invalidating condition of the policy: *Griffey* v. *New York C. Ins. Co.*, *supra.*

Thus far the question has not been considered, whether the mere consequence or result of an act of the member in violation of criminal law would come within such provision. If literally construed, it might not. The contract is rendered void if the member "die in violation of or attempt to violate any criminal law." It is not death in consequence of the violation of law, but death in or during the act of violation of law, that is expressed by the words used.

In *Bradley* v. *Mutual Ben. L. Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115, the conclusion was warranted that, at the time of his death, the assured was engaged in the violation of law. And such was the case in *Cluff* v. *Mutual Ben. L. Ins. Co.*, 13 Allen, 308, where a policy on the same life, and containing the like provisions, was the subject of the action, and the defense was the same.

In *Murray* v. *New York Life Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658, the provision of the policy was, that, if the assured should "die in or in consequence of the violation of the laws," etc., the policy would be void. It may be, if the mortal injury is received while the assured is engaged in the criminal act, that the death, following as the consequence, comes within the import of the provision. But the view taken renders it unnecessary to consider that question, and no opinion is expressed upon it.

The conclusion is, that the death of the member by suicide did not, within the meaning of any provision of the policy, render it for that reason void, and therefore the exclusion of the evidence upon that subject was not error. No other question requires the expression of consideration.

The judgment should be affirmed.

INSURANCE OF LIFE — SUICIDE. — Where the policy provided that if the insured should commit suicide, "felonious, or otherwise, sane or insane," the policy should be void, and he did commit suicide while temporarily insane, no recovery could be had upon the policy, although the deceased was in no manner conscious of or responsible for what he did: *Scarth* v. *Security Mut. L. Soc.*, 75 Iowa, 346. But where the policy read, "in case the insured shall die by his own hands, ... this policy shall be null and void, except that in case he shall die by his own hand while insane, the amount paid by this company on the policy shall be the amount of the premium actually paid thereon, with interest," in order to defeat recovery upon the policy, on the ground that deceased died by his own hands, the company must show that the insured knew the physical nature of the act he committed, and that it would kill him: *Mutual B. L. Ins. Co.* v. *Daviess*, 87 Ky. 542.

Insurance — Suicide. — In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for forfeiture of a policy, unless it is expressly so stipulated in the policy: *Kerr* v. *Minnesota Mut. Ben. Ass'n*, 39 Minn. 174; 12 Am. St. Rep. 631, and note as to the death of insured in consequence of violation of law as a defense to an action on the policy.

Construction of Insurance Contracts. — Conditions in an insurance policy as to forfeitures must be construed strictly against the company insuring, and liberally in favor of the assured: *Queen Ins. Co.* v. *Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Mutual Assur. Soc.* v. *Scottish Union etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note 826.

Mutual Benefit Society — Refusal to Pay Loss or Make Assessment — Remedy. — When a mutual benefit life insurance society, which depends upon assessments levied upon its members to secure money to meet death claims against it, refuses to make assessments in any proper case, the remedy of the beneficiary is by an action for a breach of contract: *Bentz* v. *Northwestern Aid Ass'n*, 40 Minn. 202; and in such action substantial damages may be recovered: *Jackson* v. *Northwestern Mutual Relief Ass'n*, 73 Wis. 507.

McDonald *v.* Long Island Railroad Company.

[116 New York, 546.]

Railroad Corporation must Give Passengers a Reasonable Opportunity for Alighting from its train at a station where it stops, and reasonable diligence on the part of its passengers in alighting from it is also required.

A Railroad Corporation is not Excused from Giving Passengers a Reasonable Time to Alight from its train at a station by the fact that its conductor did not know the passenger intended to alight, unless the latter was so situated as to conceal himself from observation. The fact that a passenger proceeds to leave a train at a station where it has stopped ought to be known by the company through its servants, and therefore, so far as it is essential, it is deemed chargeable with knowledge.

Contributory Negligence of Passenger in Alighting from Railroad Train. — One about to alight from a train at a station where it has stopped has the right to assume that he will be allowed a reasonable time in which to do so before the train starts, and is therefore not chargeable with contributory negligence if he omits to retain his hold on the railing, or to seek the conductor and inform him of his purpose to leave the train, or to see that his movements to leave the train are observed by the conductor.

Negligence. — The Want of Contributory Negligence may be Determined by the Court as a Matter of Law when there are no facts in evidence from which any inference of negligence can arise.

Edward E. Sprague, for the appellant.

J. Stewart Ross, for the respondent.

BRADLEY, J. The action was founded upon the charge of negligence of the defendant, by which the plaintiff sustained personal injuries. In the evening of April 27, 1885, the plaintiff took passage on a train upon the defendant's railroad at Flatbush, to ride to a station at Rockaway Avenue, and in alighting at the latter place, he received the injury complained of. The evidence on the part of the plaintiff was in conflict with that introduced by the defendant in respect to the facts essential to support the charge of negligence of the defendant, and to relieve the plaintiff from the imputation of contributory negligence. The court charged the jury that "the question is simply which story is true. Is the story told by the plaintiff and the witness Fox true? Or is the story told by the passengers who were called as witnesses for the defendant true? If you believe the plaintiff's statement, he is entitled to a verdict. If you find that the accident occurred in the way stated by the defendant's witnesses, then, plainly, the defendant is not liable, because the accident was not caused by fault on the part of the railroad company's servants."

The defendant's counsel excepted to the charge that "if the jury believe the testimony of the plaintiff and Mr. Fox, the plaintiff is entitled to recover"; and requested the court to charge "that it is for the jury to draw that inference." The justice presiding then added: "I will leave it for the jury to say whether it would not be negligence if he started to get off the train while in motion." The question presented on this review arises upon such exception to the charge.

If there was any opportunity for inference upon this testimony on the part of the plaintiff, taken as true, that negligence of the defendant or the freedom of the plaintiff from contributory negligence was not established by it, the charge was error, and although the exception was not taken to the charge precisely as made, it may be treated as fairly raising the question whether the instruction was warranted by the facts as represented by the testimony on the part of the plaintiff, to which the court referred, which was to the effect that the plaintiff sat near the front door of the car; that as soon as the train stopped at the Rockaway Avenue station, he arose from his seat, and proceeded to leave the car by going out of that door; that when he had placed one foot on the last or lower step, and was proceeding to step off the car with the other foot, which was on the next step above, he was, by a

sudden jerk of the train in starting, thrown to the ground, and one of his feet was run over and crushed.

It is the duty of a railroad company to give passengers a reasonable opportunity to leave its train at stations where it stops; and reasonable diligence on the part of its passengers in alighting from it is also required. In this instance, upon the testimony as given on the part of the plaintiff, if taken as true, the conclusion was required that the train did not stop a reasonable or sufficient time for the plaintiff to leave it before it started, and for that reason that the defendant was chargeable with negligence in that respect, unless there was some other fact bearing upon that question for the consideration of the jury. It is argued that the defendant may have been relieved from this charge of negligence by the fact, if so found, that the conductor had no knowledge that the plaintiff desired to leave the train at that station. It may be that the conductor did not have such knowledge, and that he did not see the plaintiff when he left his seat, and thus failing to observe that any passenger was leaving the train, he may have deemed delay unnecessary. The conductor may have been at the rear end of the car, and it appears that no one in the employ of the defendant was at the front end of it. The fact that the conductor did not know that the plaintiff intended to leave, and did not see him leaving the car, cannot furnish the defendant with an excuse for not giving the plaintiff a reasonable time to get from the train, unless the latter was so situated as to conceal himself from observation.

He was sitting on a seat in the car, designed for passengers, until he started to leave. He was entitled to time to get off; and if the injury was occasioned by reason of the failure of the defendant to give him such time before the train was started, it was guilty of negligence. Such opportunity to alight from a train is within the undertaking assumed by a railroad company, and the safety of travel requires the observance of that duty. The fact that a passenger proceeds to leave a train at a station where it has stopped ought, for the purpose of his protection, to be known by the company, through its servants, and therefore, so far as that is essential, it is deemed chargeable with knowledge; and if the proper discharge of duty in that respect requires more means of observation or precaution, it should be furnished. The defense cannot successfully rest upon the inference that the conductor was in a situation where he could not or did not observe the purpose of the plaintiff to

depart from the train. It is also urged that the circumstances were such as to permit the finding, upon the plaintiff's testimony, that he was not free from negligence. It is not claimed that the plaintiff did not proceed with reasonable diligence to alight, but it is insisted that the inference was permitted that he did not use reasonable care in doing so, upon the statement given by him of the circumstances. He, having the burden of proof to establish such care, is entitled to the benefit of no presumption in support of his diligence or caution.

It was very dark. He says: "I took hold of the rail and stepped down on the first step, then I had my foot on the last step, and was going to step off, and the train started, and the jerk of the car knocked me over. There is a platform and two steps, and then from there off the car. Before the car started I was off the platform, my right foot was on the last step, and my other foot on the other; my left foot was on the middle step of the platform, and my right foot on the last step. I was about to step off the car on the platform; I let go to step down; as soon as I let go it started; I did not have hold of anything when the car started; I had no warning that the car was about to start." The plaintiff had the right to assume that he would have reasonable opportunity to get off the train before it started. And it is not seen that his omission to retain his hold onto the railing, if it were practicable to do so, at the moment he was about to step from the car onto the platform of the station, could, under such circumstances, furnish any imputation of negligence on the part of the plaintiff. While the darkness called for the exercise of caution on the part of the plaintiff, his statement was to the effect that he proceeded in the usual manner to get off. He sought to go down the steps provided for the purpose, which he would, as appears by his evidence, have safely accomplished if he had been permitted. His failure to seek the conductor and inform him of the purpose to leave the train at that station, or his failure to see that his movement to do so was not observed by the conductor, furnished no fact for the jury, for the reasons before given. The leading fact litigated upon the trial was, whether the plaintiff proceeded to alight from the train as soon as it stopped at the station, or delayed doing so until it started. If he thereafter, and after a reasonable opportunity to get up, remained in his seat, the conductor may have had the right to assume that he did not intend to leave there. The court, upon that subject, charged, to which there was no exception,

that "this whole case depends simply on one question of fact: Did the passenger, as he says, attempt to alight from the train as soon as it was stopped? If he did, then there was no negligence upon his part, and the defendants were to blame in not giving him an opportunity to get off." And after thus stating the evidence of the plaintiff and its effect, and referring to that on the part of the defendant in conflict with it, he added the portion of the charge first-before mentioned. Although the question of negligence is dependent upon facts which must go to the jury, when any inference may arise, from the evidence, either to support or defeat the charge, there may be a state of facts so unqualified as to justify the determination of the fact as matter of law. The facts as represented by the evidence of the plaintiff, if taken as true, furnished all the elements of fact requisite to the liability of the defendant, and no countervailing deductions could reasonably arise from it.

These views lead to the conclusion that the exception to the charge was not well taken.

The question of the weight of evidence arising upon the very decided conflict of it, as to the essential facts, was disposed of in the court below, and is not the subject of consideration on this review.

The judgment should be affirmed.

Carriers of Passengers are bound to exercise the same degree of care towards passengers in their egress from the vehicle of transportation for a proper purpose as when they remain thereon: *Dodge* v. *Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541.

Railroad Company Engaged in Carrying Passengers must announce the name of the station on the arrival of the train thereat, and give passengers opportunity and time to alight in safety: *Dorrah* v. *Illinois Central R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and cases collected in note.

Where a Passenger is in his Proper Place upon a railway car, and makes no exposure of his person to danger, there can be no question of contributory negligence: *Louisville etc. R'y Co.* v. *Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60.

Negligence, when a Question of Law. — The question of negligence ought not to be taken from the jury, unless the conduct of the plaintiff, relied upon as contributory negligence, is established by uncontradicted testimony, so that no room is left for ordinary minds to differ: *Baltimore etc. R. R. Co.* v. *Kane*, 69 Md. 11; 9 Am. St. Rep. 387; *City R'y Co.* v. *Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798, and note. But when the facts are undisputed, the question of contributory negligence is for the court to determine: *Seefeld* v. *Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and cases in note.

PETTENGILL *v.* CITY OF YONKERS.

[116 NEW YORK, 558.]

VARIANCE BETWEEN ALLEGATION AND PROOF. — Under a complaint alleging negligence on the part of a city in excavating a dangerous hole or trench, and throwing up a dangerous embankment therefrom in the streets, by and under the direction of defendant, and in suffering the trench and embankment to be without protection or notice to travelers, evidence is admissible to show either a dangerous obstruction created by the city, and left unguarded, or a like obstruction created by some third person, and left unguarded by the city after notice of its existence.

MUNICIPAL CORPORATION MUST BE DEEMED TO HAVE KNOWLEDGE OF DANGEROUS CONDITION OF A STREET when it had been in such condition two months before an accident.

MUNICIPAL CORPORATION HAS A DUTY TO KEEP ITS STREETS IN SAFE CONDITION FOR PUBLIC TRAVEL, and must exercise reasonable diligence to accomplish that end; and this rule is equally applicable, whether the act or omission complained of is that of the municipality, or of some third person.

MUNICIPAL CORPORATION, WHEN PRIVATE OR PUBLIC IMPROVEMENTS ARE BEING MADE IN ITS STREETS, MUST GUARD THEM so as to protect travelers from resulting injuries therefrom, and if necessary to prevent accident, should, by some barrier, close the street against the public, so that no harm may happen if the work should be delayed.

PUBLIC STREETS — NEGLIGENCE. — ONE USING A PUBLIC STREET MAY ASSUME THAT THE MUNICIPALITY, whose duty it is so to do, has kept the street in safe condition, and he is therefore not guilty of negligence in not exercising diligence to discover a dangerous obstruction.

MUNICIPAL CORPORATION. — THE FACT THAT IT IS THE DUTY OF A CONTRACTOR, doing work on public streets, to maintain warning lights at an excavation he has made, does not relieve the municipality from liability for an accident resulting from the negligent omission to maintain such lights.

MUNICIPAL CORPORATION IS ANSWERABLE FOR ITS BOARD OF WATER COMMISSIONERS, WHEN SUCH BOARD, though created by special statute, is recognized as a department of the city government in the charter, and charged with the duty of making necessary surveys, and preparing a general plan and system of sewers for the city, and of preparing and approving specifications for constructing all sewers, drains, wells, fire cisterns, laying water-pipes, and erecting hydrants.

MUNICIPAL CORPORATIONS. — TO DETERMINE WHETHER THERE IS A MUNICIPAL RESPONSIBILITY, the inquiry must be, whether the department whose misfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality.

Joseph F. Daly, for the appellant.

James M. Hunt, for the respondent.

BROWN, J. The plaintiff recovered a judgment at the circuit for ten thousand dollars for personal injuries received by her

in consequence of an obstruction in Yonkers Avenue, one of the public streets in the city of Yonkers.

The obstruction consisted of a heap of dirt and rocks thrown out from a trench dug for the purpose of laying water-pipes. The night of the accident was very dark and misty. The plaintiff was riding with her husband in a wagon, drawn by one horse, going east, and coming in contact with the heap of dirt and stones, the wagon was overturned and the plaintiff injured.

The evidence as to the existence of lights at or near the place of the accident was conflicting, but the jury were authorized to find, and on this appeal we must assume they did find, the facts in conformity with the plaintiff's proof.

Upon that assumption, there was no light within one hundred feet of the place of the accident, no guard or barrier around the heap of dirt or the open trench, and nothing to warn the plaintiff or her husband of danger. We are of the opinion that the case in all its aspects was one for the consideration of the jury.

The point that proof was admitted which was at variance with the cause of action alleged in the complaint, is not well taken. The cause of action was negligence on the part of the defendant in permitting one of the public streets of the city to be in a dangerous condition. The facts which constituted the negligence were alleged to be the excavation of a dangerous hole or trench, and throwing up a dangerous embankment therefrom in the street "by and under the direction of defendant," and in suffering the trench and embankment to be without protection, or notice to travelers on the night of the accident.

These facts were denied by the answer, and under the issue thus made, the plaintiff was entitled to recover by showing, to the satisfaction of the jury, either a dangerous obstruction created by the city, and left unguarded, or an obstruction created by some third person, and left unguarded by the city after notice of its existence. Upon the latter branch of the case, all the evidence relating to the condition of the street, and the absence of lights in the night-time, prior to the accident, was admissible, as it tended to show a condition of affairs from which the jury could infer that the city had or ought to have had knowledge of the dangerous condition of the street.

The evidence as to the non-existence of lights at the trench after the accident was confined to the night in question, and

was admissible to contradict the testimony of the contractors that a light was there. It may not have been strictly in rebuttal, but its admission was discretionary with the trial court.

Even if the appellant's contention that it was not responsible for the negligent acts of the water board was sound, that would not relieve it from liability in this case.

The dangerous condition of the street had existed for two months or more before the accident, and the defendant must be deemed to have had knowledge of it. Its duty was to keep the streets in a safe condition for public travel, and it was bound to exercise reasonable diligence to accomplish that end, and the rule is now well established to be applicable, whether the act or omission complained of, and causing the injury, is that of the municipal corporation or some third party: *Nelson* v. *Village of Canisteo*, 100 N. Y. 89.

Where public or private improvements are being made in a street, it is the duty of the city to guard and protect them so as to protect travelers on the street from receiving injury therefrom: *Turner* v. *City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453. And if necessary to prevent accidents, it should, by some barrier, close the street against the public, so that no harm may happen if the work on the street is delayed: *Russell* v. *Village of Canastota*, 98 N. Y. 496.

A person using a public street has no reason to apprehend danger, and is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the daytime or night-time, relying upon the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel have performed that duty, and that he is exposed to no danger from its neglect.

Although the street where this accident happened had been in a dangerous condition for weeks, the proof does not show the slightest effort on the part of the city to warn travelers of its condition. It appeared to have relied upon the contractor to maintain the warning lights at the excavation, which, under his contract, he was bound to do. But the city was not absolved from its liability by this provision of the contract: *Turner* v. *City of Newburgh*, *supra*.

We think, however, that the board of water commissioners was one of the instrumentalities of the government of the city, and that the defendant is liable for its negligent acts.

In *Ehrgott* v. *Mayor etc.*, 96 N. Y. 273, this court said: "To

determine whether there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality."

The duty of supplying the citizens of Yonkers with water is by statute made a municipal duty, and the board of water commissioners exists for that purpose.

While this board is created by special statute, it is recognized as a department of the city government in the charter, and charged with the duty of "making the necessary surveys, etc., and preparing a general plan and system of sewers for the city," also "of preparing and approving specifications for constructing all sewers, drains, wells, fire cisterns, laying water-pipes, and erecting hydrants."

The board exists solely for the benefit of the city. It can own no property, and do no act that has not reference to the well-being of the city. It is given the power to purchase and acquire land, but the title, when acquired, vests in the city. For its contracts the city is liable, and judgments recovered against it are judgments against the city. When the water-rents collected by it are more than sufficient to meet its expenses, the surplus must go to the benefit of the city. It is denominated the "board of water commissioners of the city of Yonkers." It is not an independent body acting for itself, but is a department of the city, and one of the instruments of the municipal government. Being such, when engaged in digging the trench for the purpose of laying water-pipe in Yonkers Avenue, it was engaged in the discharge of a municipal duty, and it was obligatory upon it, in so doing, to so protect and guard the work that it should not endanger persons using the street, and if that was impossible, with a due and diligent prosecution of the work, the street should, by suitable barrier, have been closed against the public.

For its failure so to do, and for injuries resulting from such failure, the defendant is liable: *Ehrgott* v. *Mayor etc.*, 96 N. Y. 265; *Walsh* v. *Mayor etc.*, 107 Id. 220; *Barnes* v. *District of Columbia*, 91 U. S. 540; *Brusso* v. *City of Buffalo*, 90 N. Y. 679.

None of the exceptions to the charge of the learned judge who presided at the trial are well taken, and the judgment should be affirmed, with costs.

MUNICIPAL CORPORATIONS. — Municipal corporations are bound to keep their streets in such condition and repair that persons of ordinary prudence may travel upon them without injury to themselves: Note to *Whitfield* v. *Meridian*, 14 Am. St. Rep. 598, 599; and this duty extends also to sidewalks: *Lindsay* v. *City of Des Moines*, 74 Iowa, 112; and city bridges: *Goshen* v. *Myers*, 119 Ind. 196. But a person who has sustained injuries by reason of defective sidewalks may be required by the provisions of a city's charter to first exhaust his remedy against the adjoining lot-owners, whose duty it is to keep the sidewalks in repair, before he can sue the city for damages: *Henker* v. *Fond du Lac*, 71 Wis. 616. The statutory duty imposed upon Detroit City to keep its streets, etc., in repair, and safe for public travel, extends to members of the city fire department as well as to the general traveling public: *Coots* v. *Detroit*, 75 Mich. 628. A city is only liable for lack of ordinary care in providing sufficient and suitable sidewalks, guttering, etc.; but if, from lack of ordinary care, the sidewalks, guttering, etc., become so defective as to become active agents, commingled with the act of God, in producing damage, the city will be liable therefor: *Haney* v. *Kansas City*, 94 Mo. 334. But the doctrine that a city is liable for neglect to keep in repair its streets is limited to apply only to streets open to public use, and used by the traveling public: *Austin* v. *Ritz*, 72 Tex. 392. Want of funds is a matter of defense to a city seeking to excuse itself from liability because of failing to keep its streets in repair: Id.; *Whitfield* v. *Meridian*, 65 Miss. 570; 14 Am. St. Rep. 596.

MUNICIPAL CORPORATIONS — ACTS OF CONTRACTOR. — A city is not absolved from its duty of keeping streets in repair, and in a safe condition for public travel, because it has employed a contractor to do work thereon: *Village of Jefferson* v. *Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136, and note; compare *Welter* v. *St. Paul*, 40 Minn. 460; 12 Am. St. Rep. 752, and particularly note 753, 754.

MUNICIPAL CORPORATIONS — NOTICE OF DEFECTS IN STREETS. — A city must have notice of defects in its streets before it can be held responsible for injuries sustained therefrom: *Mayor of Montezuma* v. *Wilson*, 82 Ga. 206; 14 Am. St. Rep. 150, and particularly note. As to what constitutes notice to a city of its defective streets: Note to *Whitfield* v. *Meridian*, 14 Id. 599; note to *Mayor of Montezuma* v. *Wilson*, 14 Id. 152.

VARIANCE BETWEEN ALLEGATIONS AND PROOF. — In an action to recover damages sustained by reason of a defective sidewalk, the complainant alleged that defendant "wrongfully and negligently suffered the same to be and remain in a bad and unsafe condition, and divers of the planks wherewith said sidewalk was laid to be and remain broken, loose, and unfastened to the stringers," etc. The proof showed that the sidewalk was in an unsafe condition; that planks were loose, being unfastened to the stringers. The failure to prove that the planks were broken was not a variance: *Rock Island* v. *Cuinely*, 126 Ill. 408.

ADAMS *v.* IRVING NATIONAL BANK.

[116 NEW YORK, 606.]

CORPORATION AND TRUSTEES. — IF A TRUSTEE OF A CORPORATION REPRESENTS to a wife that her husband is in danger of arrest, and that his arrest may be avoided by the payment of certain moneys to the corporation, and recommends her to pay such money to avoid such arrest, and it is accordingly paid, he must be regarded as acting for the corporation, and it will not be permitted to deny his agency.

PAYMENT BY A WIFE IS NOT VOLUNTARY WHEN COERCED BY A THREAT that otherwise her husband will be arrested and imprisoned, and she may therefore recover the amount she paid.

DURESS PER MINAS — THREATS OF LAWFUL ARREST. — In relation to husband and wife, parent and child, each may avoid a contract induced and obtained by threats of the imprisonment of the other; and it is of no consequence whether the threat is of lawful or unlawful imprisonment. The principle which underlies all this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the conduct and interest of another, contracts thus made will be set aside.

ACTION to recover moneys claimed to have been obtained from plaintiff by coercion and undue influence. The plaintiff's husband was adjudged a bankrupt in 1878, and the defendant was one of his creditors. His health was broken, and the plaintiff, having been advised to go with him to Europe, had engaged passage for June 17, 1879. A few days prior to the intended departure for Europe, plaintiff's husband was examined in a court of bankruptcy, and from such examination it was ascertained that an entry on the stub of his check-book, "F. Munoz, taxes and expenses," did not in fact relate to taxes or expenses; that Munoz was merely the messenger to receive the money; that the money had been delivered to a Mr. Warner, with the request to keep it for plaintiff's husband, and that the money still remained in Warner's possession. The husband claimed that his intention in thus secreting money was to pay an indebtedness to his brother's widow; but it had not been used for that purpose, and it was admitted that the plaintiff's husband might have changed his mind, and applied the money to other purposes. The plaintiff heard that defendant and its attorney were threatening to arrest her husband. The husband at once went to Mr. Castre, a vice-president and director of the defendant, and talked with him about the arrest, and asked him if he would become his bail. While Castre consented to do so, he suggested that some settlement be made with the bank, and that the plaintiff had the means of making such settlement. The plaintiff was informed of this conversation between her husband and Mr. Castre, and

thereupon she went to see the latter. She asked him if he had heard about the threatened arrest, and he said he had; that he had heard that it was the intention of the defendant's attorney to arrest her husband on board the steamer. She inquired whether her husband had committed any crime, and was told that he had not, but that any man could be arrested, and was asked: "How would you like to have your husband arrested on Saturday night, and too late to obtain bail?" Castre then proposed a settlement, and advised her not to consult a lawyer, suggesting that she had nearly money enough in the Irving Savings Bank, and told her that the arrest would be withdrawn. She thereupon became excited, and willing to make every effort to save her husband. She paid two thousand dollars to the bank, and undertook to pay an additional two thousand in monthly installments of fifty dollars each. After paying four hundred dollars upon these installments, she refused to pay any more, and brought this action to recover the moneys she had paid.

John E. Parsons, for the appellant.

Austin G. Fox, for the respondent.

BROWN, J. The evidence as to the statements and representations made to the plaintiff to induce her to make the settlement with the bank was conflicting. The jury were, however, entitled to, and upon the defendant's appeal we must assume they did, adopt the view of the transaction properly inferable from the plaintiff's evidence. This evidence justified the inference that the payment to the bank was not the free, unconstrained, and voluntary act of the plaintiff, but was induced by the fear of her husband's arrest on the eve of their departure for Europe, and the effect such an act might have upon his health at that time, shattered and feeble from the misfortune that had overtaken him.

It cannot be successfully claimed, in view of the finding of the jury, that Mr. Castre did not act for the bank. Although perhaps not in the first instance a party to any attempt to secure a settlement of the claim from the plaintiff, in all that he did after he was consulted he acted for the bank, and he testified: "I supposed Mrs. Adams was able to take care of herself. I performed my duty towards the bank, in which I was a stockholder, and let her look after herself."

The bank, having received the proceeds of the settlement,

cannot now be heard to deny the agency through which it was obtained: *Krumm* v. *Beach*, 96 N. Y. 398.

It is claimed by the appellant that the plaintiff was not entitled to recover if there was a lawful ground for the arrest of her husband; in other words, that a threat of unlawful arrest and imprisonment is necessary to constitute *duress per minas*. This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice, the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain goods wrongfully detained; excessive fees, when taken under color of office; excessive charges collected for performance of a duty, etc.

In all such cases there was a moral coercion which destroyed the contract.

The rule cited by the appellant has no application to a case like the present, where money has been obtained from a wife by threats to imprison her husband, and none of the cases cited by the appellant so hold. *Metropolitan Ins. Co.* v. *Meeker*, 85 N. Y. 614, was a case where the defendant was held to be estopped to deny the validity of a mortgage.

In *Haynes* v. *Rudd*, 83 N. Y. 251, 102 Id. 372, 55 Am. Rep. 815, the decisions went upon the ground that the note was given to compound a felony, and the contract was for that reason illegal. *Smith* v. *Rowley*, 66 Barb. 502, was decided on grounds similar to *Haynes* v. *Rudd*, *supra*.

In *Solinger* v. *Earle*, 82 N. Y. 393, plaintiff gave the note in suit to induce the defendant to sign a composition of debts of a firm of Newman and Bernhard. The note was transferred to a *bona fide* holder, and having been compelled to pay it, plaintiff brought the suit to recover from defendants the amount paid.

The court held the contract was illegal, and the same rule that would have protected plaintiff in an action on the note by the payees protected the defendant in resisting an action to recover back the money paid on it. *Farmer* v. *Walter*, 2 Edw. Ch. 601, *Knapp* v. *Hyde*, 60 Barb. 80, *Dunham* v. *Griswold*, 100 N. Y. 224, *Quincey* v. *White*, 63 Id. 370, were actions in which the contract was made by the person against whom the duress was claimed to have been exerted.

It is not an accurate use of language to apply the term "duress" to the facts upon which the plaintiff seeks to recover.

The case falls rather within the equitable principle which renders voidable contracts obtained by undue influence. However we may classify the case, the rule is firmly established that in relation to husband and wife, or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment.

Eadie v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395, is a leading authority on this question. In that case an assignment of a life insurance policy was obtained by threats to prosecute the plaintiff's husband criminally for embezzlement. The husband, whose life was insured, having died, the action was brought to determine the ownership of the money due from the insurance company. Judge Smith, who delivered the opinion of the court, says: "The assignment from the plaintiff to the defendant was most clearly exacted by a species of force, terrorism, and coercion which overcame free agency, in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress, more distressing than any fear of bodily injury or physical constraint. . . . . A deed executed at such a time, under such circumstances, should be deemed obtained by undue influence, and ought not to stand."

Five judges appear to have concurred in the part of the opinion quoted. Judge Denio concurred, on the ground that the policy was not assignable, and Judge Wright dissented. The case was cited as an example of duress of person in *Peyser* v. *Mayor etc.*, 70 N. Y. 501, 26 Am. Rep. 624, and as an authority for avoiding a note obtained by duress in *Osborn* v. *Robbins*, 36 N. Y. 365. It has frequently been cited in the supreme court: *Fisher* v. *Bishop*, 36 Hun, 114; *Haynes* v. *Rudd*, 30 Id. 237; *Ingersol* v. *Roe*, 65 Barb. 357; *Schoener* v. *Lissauer*, 36 Hun, 102; and in other states and in the text-books, and has thus become a leading authority upon the question under discussion. It is nowhere suggested in that case, either in the facts or in the opinion, that it was necessary, to sustain the judgment in favor of the plaintiff, that the threat must have been of an unlawful or illegal arrest. For all that appears, the husband was guilty of the charge made, and on that assumption it is peculiarly like the case at bar. Other authorities sustain the same principle. In *Haynes* v. *Rudd*, 30 Hun, 237, it was said: "We think that when threats of lawful prosecution are purposely resorted to for the purpose of over-

coming the will of the party threatened, by intimidating or terrifying him, they amount to such duress or passion as will avoid a contract thereby obtained." This statement of the law was not disturbed by this court, the reversal being put on other grounds.

In *Schoener* v. *Lissauer*, 36 Hun, 102, a bond and mortgage was obtained from the mortgagor by the threat that unless it was given, his son, who was charged with embezzlement, would go to state prison. The mortgage was set aside, and this court sustained the judgment. After stating the facts, it was said by Judge Rapallo: "On the merits, this judgment is sustained by *Bayley* v. *Williams*, 4 Giff. 638; L. R. 1 Eng. & Ir. App. 200; *Davies* v. *London Ins. Co.*, L. R. 8 Ch. Div. 469." The first case cited by Judge Rapallo fully sustains the recovery in the case at bar.

In *Harris* v. *Carmody*, 131 Mass. 51, 41 Am. Rep. 188, a mortgage was obtained from a father on the threat that his son, who was charged with forging his father's name to notes held by the plaintiff, would be sent to the state prison. It was held that the father could avoid the mortgage, on the ground that it was made to relieve the son from duress. See also *Taylor* v. *Jaques*, 106 Mass. 291.

In none of the cases cited was it suggested that the threat, which induced the making of the contract, was of an illegal prosecution or an unlawful arrest, and in most of them it appears that the person charged with the offense was guilty.

The principle which appears to underlie all of this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, contracts thus made will be set aside: 1 Story's Eq. Jur., secs. 239–251; 2 Pomeroy's Eq. Jur., secs. 942, 943; *Lomerson* v. *Johnston*, 44 N. J. Eq. 93; *Ingersol* v. *Roe*, 65 Barb. 346; *Fisher* v. *Bishop*, 36 Hun, 112; 108 N. Y. 25; 2 Am. St. Rep. 357; *Barry* v. *Equitable Life A. Co.*, 59 N. Y. 587.

In the last case cited, it was said: "When there exists coercion, threats, compulsion, and undue influence, there is no volition. There is no intention or purpose but to yield to moral pressure for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired."

It was not error, therefore, for the court to deny the motion to dismiss the complaint on the ground that there was no

evidence that the money was paid under duress. Upon the evidence it was a question of fact whether the agreement was executed and the money paid in consequence of threats and undue influence: *Dunham* v. *Griswold*, 100 N. Y. 224.

If the money was paid by the plaintiff through fear produced by Mr. Castre's representations, that if the claim was not settled, her husband would be arrested and imprisoned, the payment was not a voluntary one, and the defendant obtained no title to the money received. This question was settled in plaintiff's favor by the verdict of the jury.

The point made by the appellant that the transaction was a compounding of a felony does not appear to be raised by any appropriate exception in the case. It was not suggested on the trial, either in the motion to dismiss or in the requests to charge. There was no instruction asked or given to the jury on the subject. The question is, therefore, not before this court.

Upon the question of ratification, the court instructed the jury as follows: "Before there can be a ratification to prevent her recovery in this action, there must be some distinct act of hers, after knowledge of the facts and knowledge by her that she had a right to rescind the agreement." An exception was taken to this part of the charge, and the claim is now made that this court should hold, as a matter of law, that plaintiff had waived her claim.

The defendant appears to have acquiesced in the submission of this question to the jury as one of fact for their determination. It was not made one of the grounds of the motion to dismiss. In part, at least, the charge of the court was correct. I do not understand the learned counsel for the appellant to criticise that part of the charge relating to ratification by some act "after knowledge of the facts." If any qualification was proper in the expression as to her "knowledge . . . . that she had a right to rescind," it was the duty of the appellant to suggest it. A general exception cannot be sustained: *Smedis* v. *B. & R. B. R. R. Co.*, 88 N. Y. 15; *Doyle* v. *New York Eye and Ear Infirmary*, 80 Id. 634.

We have carefully examined the exceptions to the admissions of testimony, and while some of the evidence was immaterial, we think none of the rulings are of a character to call for a reversal of the judgment.

The judgment should be affirmed, with costs.

DURESS PER MINAS. — As to the essentials of duress, extended note to *Hatter* v. *Greenlee*, 26 Am. Dec. 374-378. A father may avoid a mortgage which he was induced to make by threats of prosecution and imprisonment of his son: *Harris* v. *Carmody*, 131 Mass. 51; 41 Am. Rep. 188; but see *Harmon* v. *Harmon*, 61 Me. 227; 14 Am. Rep. 556. But threats of legal process, or legal prosecution, or legal arrest, do not constitute duress *per minas: Claflin* v. *McDonough*, 33 Mo. 412; 84 Am. Dec. 54; *Fulton* v. *Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Compton* v. *Bunker Hill Bank*, 96 Ill. 301; 36 Am. Rep. 147. To constitute duress by threats of illegal arrest, the act which the party seeks to avoid must have been done by him through fear of such threatened arrest: *Flaniyan* v. *Minneapolis*, 36 Minn. 406.

PAYMENT OF MONEY UNDER COMPULSION, where no legal burden exists, is a legal injury, and the money may be recovered back: *Cox* v. *Welcher*, 68 Mich. 263; 13 Am. St. Rep. 339, and particularly note.

CORPORATIONS ARE RESPONSIBLE for the acts of its servants engaged in the corporation's business, in the same manner and to the same extent as individuals are liable under similar circumstances: *Hussey* v. *Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312.

GALUSHA *v.* GALUSHA.

[116 NEW YORK, 635.]

HUSBAND AND WIFE. — CONTRACTS FOR THE FUTURE SEPARATION OF HUSBAND AND WIFE are void.

HUSBAND AND WIFE. — CONTRACT BETWEEN HUSBAND AND WIFE AFTER THEIR SEPARATION, through the intervention of a trustee, is effective to bind the husband to contribute the sum therein provided for her support, and it is also binding on the wife and the trustee, that she will accept the payment therein designated in full satisfaction of her maintenance and support.

HUSBAND AND WIFE. — THE DIVORCE OF A HUSBAND AND WIFE AFTER THEY HAVE ENTERED INTO A VALID AGREEMENT OF SEPARATION, or the commission by either of them of an act entitling the other to a divorce, does not avoid or annul such agreement, or entitle either to be released therefrom; and the court granting a decree errs if it disregards the agreement, and makes provision for the wife inconsistent therewith.

ACTION for divorce on the ground of adultery. Defendant, in answer to the claim for alimony, pleaded an agreement of separation, made April 30, 1883, between himself and his wife, and one Galusha Phillips as her trustee. For several years before their final separation, the relations between husband and wife had not been agreeable, and at times they had lived apart. At the time when the agreement was entered into, the wife had discovered sufficient grounds to entitle her to a divorce, and had separated from her husband. Afterwards negotiations for a settlement had been entered into, and had resulted in the agreement pleaded by the defendant, in which he had bound

himself to pay his wife certain sums of money, and to give her certain property specified in the agreement, and further, to pay her one hundred dollars on the first of each month during the remainder of her natural life. On her part and that of the trustee, it was agreed to accept the sums of money in the agreement in full satisfaction of her claim for maintenance and suppert, and that thereafter she would support and maintain herself, and save her husband harmless from the payment of all sums on account of her support, maintenance, medical attendance, and any and all expenses, legal and otherwise. If the wife should survive the husband, she had a right to continue the agreement, and receive one hundred dollars per month, and in that event she was to release all right of dower and all claims against his estate. The trial court dissolved the marriage, and awarded the plaintiff the sum of $3,750 yearly, without making any reference in its decree to the agreement of separation. On appeal to the general term, the judgment was modified by reducing the amount of alimony to three thousand dollars a year, and by inserting in the decree a clause declaring that the force and legal effect of the agreement of separation was terminated.

Esek Cowen and W. H. Bowman, for the appellant.

J. A. Stull, for the respondent.

PARKER, J. Was it error to disregard the agreement between the parties to this action and the trustee, providing for the support of this plaintiff during her life, and to make such an allowance as to the court seemed just, is the question presented for our consideration.

The trial court apparently adopted the view that, inasmuch as the statute empowers the court to require the wrong-doing husband to provide for the support of the wife, it may permit the agreement to stand, and, in addition thereto, compel the defendant to pay such other or further sum as the surrounding circumstances suggest to be just. On the other hand, the general term proceed upon the theory that the plaintiff is not entitled to her support under and by virtue of an agreement in which she and her trustee contract that the defendants shall not be called upon to pay any other sum for that purpose, and at the same time be permitted to receive an additional allowance for her support by virtue of a judgment of the court, and therefore modified the judgment appealed from by the insertion of a provision declaring the termination

of the force and legal effect of the separation agreement. It is well, therefore, at the outset, to consider the validity and binding force of this contract, which one court ignores and another brushes away.

Marriage is favored in the law, and as a contract not to marry is against public policy, and void, so, too, is a contract between husband and wife to be divorced, or in the happening of a future event, to live apart.

But while a contract to separate in the future is void, it is now too well settled, both in England and this country, to admit of discussion, that after a separation has taken place, a contract may be made through the intervention of a trustee, which is effective to bind the husband to contribute the sum therein provided for the future support of the wife: Bishop on Marriage and Divorce, secs. 637, 650; *Carson* v. *Murray*, 3 Paige, 483; *Magee* v. *Magee*, 67 Barb. 487; *Pettit* v. *Pettit*, 107 N. Y. 677; *Calkins* v. *Long*, 22 Barb. 97.

The contract of separation is also valid, so far as relates to the indemnity given to the husband by the trustee. Such covenants are mutual and dependent: *Wallace* v. *Bassett*, 41 Barb. 92; *Dupre* v. *Rein*, 7 Abb. N. C. 256.

The contract between these parties was made after actual separation, and through the intervention of a trustee. By its terms, the defendant obligated himself to pay, for the benefit of this plaintiff, certain fixed sums of money, and, in addition thereto, to pay to the trustee, for her benefit, one hundred dollars monthly during her natural life. On the part of the plaintiff and the trustee, it was covenanted to "accept such payments, in full payment and satisfaction, for the maintenance and support of said Sarah F. Galusha during her natural life; and the said Galusha Phillips, trustee, in consideration of the several payments hereinbefore mentioned, does hereby agree to and with the said party of the first part that Sarah F. Galusha shall fully support and maintain herself, and provide all things of all kinds necessary for her full support and maintenance, and that said Sarah F. Galusha will perform all acts and covenants which she has herein agreed to do and perform, and to save said party of the first part harmless from the payment of all sums of money for or on account of the full support, maintenance, medical attendance, and any and all expenses, legal or otherwise, of said Sarah F. Galusha, for and during her natural life.'

In view of the situation of the parties, the contract was, at

the time of the execution, valid and binding upon all the parties thereto. The defendant has fully performed on his part, and it would seem as if he were entitled to the protection which it was stipulated that full performance should give to him.

The argument that upon the granting of the decree of divorce there was a failure of consideration to support the agreement, is without force.

The consideration for an agreement of separation fails, and the contract is avoided when separation does not take place, or where, after it has taken place, the parties are reconciled, and cohabitation resumed. Neither of these events happened. The suggestion that the subsequent violation of the marriage vow by the defendant may be treated as vitiating the separation agreement does not require extended consideration, for it is without potency.

Because of the marriage relation, the husband was bound to support his wife. This legal obligation constituted the basis for a settlement of their affairs, and the making of an agreement by which it should be definitely determined how much he should be obliged to contribute, and she entitled to receive from him, for her support.

After its making, it was not in the power of either party, acting alone and against the will of the other, to do an act which would destroy or affect that contract. The act of adultery did not of itself subvert the marriage contract. It enabled the wife, through the aid of the courts, to relieve herself from the legal restraints of the marriage tie. But she need not have availed herself of that privilege.

She might have determined to condone the offense. Condonation is favored in the law. The wrongful act of the husband, then, did not of itself avoid even the marriage contract. Much less was it potent to affect a contract founded, not upon a promise to faithfully observe the marriage vows, but, instead, upon a legal obligation to support and maintain the wife.

Neither did the act of the wife in availing herself of the husband's wrong to free herself from matrimonial bonds affect the separation agreement. At the time of the execution of the agreement, husband and wife had separated. It was fully determined that they should not live together again. In that situation, the wife demanded and the husband conceded a separate support.

The agreement provided not merely for her support during

their joint lives, but also that, in event of death, his estate should contribute a like support each year, so long as she should live. By its terms, the parties attempted a severance and settlement of their relations toward each other in all respects save one, which should last for all time. They were powerless to dissolve the marriage tie, and of course did not attempt it. But they did make a settlement, which was intended to separate them forever, as absolutely as it was in their power to do. The language of Chief Judge Ruger, in delivering the opinion of the court in *Carpenter* v. *Osborn*, 102 N. Y. 559, is applicable to the agreement here. "There is no express or implied condition in the contract that the plaintiff should continue to remain the wife of John Carpenter, but the obligation to pay interest was to continue unconditionally during her natural life." No attempt was made to shorten the period of payment, should divorce or marriage thereafter result. It is written that the death of the wife shall constitute the event which shall terminate the agreement. And the court will not attempt to read it as if it affirmed otherwise.

The parties to that agreement were powerless to provide that they should not be visited with the legal consequences of adultery. Any agreement to that effect would have been void. Such was and is the law, and they are presumed to have known it, and to have made their contract with the knowledge and understanding that in the event of the commission of the act of adultery by either the husband or the wife, the other party would be at liberty either to permit the legal relation of husband and wife to continue, or sunder the marriage tie in an action brought for that purpose. No provision was inserted that this contract for maintenance should be affected by the subsequent wrongful act of either party, and none can be implied. A succeeding illegal act by one of the parties, whether adultery or assault and battery, would render the offending party liable to incur the legal penalty thereof; but it could not affect a prior agreement for maintenance, in the absence of a stipulation providing for such a result.

The views thus expressed lead to the conclusion that the separation agreement was not affected by the decree granting an absolute divorce. The position thus taken seems to be supported, either assertatively or by acquiescence, by text-writers and decisions: Stewart on Marriage and Divorce, sec. 191; *Grant* v. *Budd*, 30 L. T. 319; *Charlesworth* v. *Holt*, 43

L. J., N. S., pt. 2, ex. 25; *Clark* v. *Fosdick*, 13 Daly, 500; *Wright* v. *Miller*, 1 Sand. Ch. 103; *Carpenter* v. *Osborn*, 102 N. Y. 552; *Jee* v. *Thurlow*, 2 Barn. & C. 547; *Kremelberg* v. *Kremelberg*, 52 Md. 553.

We have, then, a valid tripartite agreement, and a subsequent judgment of divorce rendered in an action wherein two of the parties to the agreement only are plaintiff and defendant. The plaintiff did not, in her complaint, ask, as a part of the relief, that the separation agreement be set aside. She did not allege that it had been obtained fraudulently or by means of duress. In no way whatever was its validity attacked, or a foundation laid which would have empowered a court of equity to set it aside. The subsequent order of the general term, therefore, in directing such a modification of the judgment of divorce as would terminate the force and legal effect of this valid separation agreement cannot be sustained.

The authority conferred upon the court by the code, to require the defendant to provide suitably for the support of the plaintiff as justice requires, is not so broad and comprehensive as to admit of a construction conferring upon the court power to ignore all existing rules as to parties, pleadings, and proof, and arbitrarily set aside a valid agreement, because, in the judgment of the court, one of the parties agreed to accept from the other a less sum of money than she ought.

We must now consider briefly whether the trial court should have granted an allowance in addition to the sum which the parties had voluntarily agreed was sufficient for the support of the wife, and which both the wife and trustee covenanted to accept in full for her support and maintenance during her natural life.

There are a number of cases where, notwithstanding a voluntary settlement by a husband upon his wife, the court has made an additional allowance, upon the ground that the settlement was inadequate for her support: Bishop on Marriage and Divorce, sec. 375, and cases cited.

But our attention has not been called to a case in which the court has held that, where the wife, by the intervention of a trustee, makes a valid agreement that the settlement is sufficient for her support, and indemnifies the husband against any other or further payment therefor, the court will make a further allowance while that agreement is in force. The statute authorizes the court, in the final judgment dissolving the marriage, to require the defendant to provide suitably for the

support of the plaintiff as justice requires, having regard to the circumstances of the respective parties. It directs this to be done because, upon the dissolution of the marriage relation, the legal obligation of the husband to support the wife ceases. But for the power thus conferred upon the court, the result of the husband's misconduct would be to relieve him from the duty of supporting the wife whom he had wronged. But this authority to protect the wife in her means of support was not intended to take away from her the right to make such a settlement as she might deem best for her support and maintenance. The law looks favorably upon and encourages settlements made outside of courts between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful, and the contract, without fraud or duress, is properly and voluntarily executed, the court will not interfere. To hold otherwise would be not only to establish a rule in violation of well-settled principles, but, in effect, it would enable the court to disregard entirely settlements of this character. For if the court can decree that the husband must pay more than the parties have agreed upon, it is difficult to see any reason why it may not adjudge that the sum stipulated is in excess of the wife's requirements, and decree that the husband contribute a smaller amount.

The views expressed lead to the conclusion that the judgment appealed from should be modified by striking out the provision terminating the force and effect of the separation agreement dated April 30, 1883.

It should be further modified by striking out the provision allowing alimony, and as thus modified, the judgment should be affirmed.

HUSBAND AND WIFE — AGREEMENTS FOR SEPARATION. — As to the validity of agreements between husband and wife for separation, and the effect of such agreements, generally: Extended note to *Stephenson* v. *Osborne*, 90 Am. Dec. 367–370.

In *Pettit* v. *Pettit*, 107 N. Y. 677, where a husband and wife had separated, and, pending an action by the wife for a limited divorce, a settlement was agreed upon between them, providing that the husband's property should be sold, and one third of the proceeds paid to the wife, and that they should live separate, the agreement constituted a valid contract enforceable at the instance of the wife for her share of the proceeds.

In the case of *Estate of Noah*, 73 Cal. 583, 2 Am. St. Rep. 829, it was decided that a wife, who had entered into a voluntary valid agreement with her husband for separation, whereunder she received certain moneys, and waived all her marital rights and claims, and she voluntarily continued to live apart from her husband, never attempting to annul the above agreement, ceased to be a member of her husband's family, and could take nothing by succession out of his estate after his death.

PEOPLE *v.* BUDD.

[117 NEW YORK, 1.]

CONSTRUCTION OF STATUTE — ACTUAL COST, WHAT IS. — A statute of New York declaring that the owners of elevators shall not charge for trimming and shoveling to the leg of the elevator more than actual cost, does not permit a charge for such work to include the sum paid for the use of a steam-shovel belonging to the elevator company. The words used in the statute exclude any charge by the company beyond the sum specified for the use of its machinery in shoveling, and the ordinary expense of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator.

JOINDER OF SEVERAL DISTINCT MISDEMEANORS IN THE SAME INDICTMENT is not a cause for the reversal of the judgment, where there is a general verdict, and the sentence is single, and is appropriate to either of the counts upon which the conviction was had.

CONSTITUTIONAL LAW — MAXIMUM CHARGES. — LEGISLATIVE POWER EXISTS under the constitution of the state of New York to prescribe a maximum charge for elevating grain by a stationary elevator owned by individuals or corporations who have appropriated their property to this use, and are engaged in this business.

CONSTITUTIONAL LAW. — PROTECTION OF PRIVATE PROPERTY IS ONE OF THE MAIN PURPOSES OF GOVERNMENT, BUT NO ONE HOLDS HIS PROPERTY BY SUCH ABSOLUTE TENURE as to be free from the power of the legislature to impose restraints and burdens required by the public good, and proper and necessary to secure equal rights to all.

CONSTITUTIONAL LAW — LEGISLATIVE POWER. — When a statute is challenged as overstepping boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, and the principles of legislation and legal adjudications, are pertinent and important considerations and elements in the determination of the controversy.

CONSTITUTIONAL LAW. — DECISION OF A FEDERAL COURT SUSTAINING A STATE STATUTE IS NOT RES ADJUDICATA AND BINDING ON A STATE COURT, when the same question subsequently arises under a similar statute. Only when required by the most cogent reasons, and compelled by unanswerable grounds, will the state court declare the statute to be unconstitutional, when its constitutionality has been sustained by the supreme court of the United States.

THE POLICE POWER is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state necessary for the public welfare.

CONSTITUTIONAL LAW. — THE BOUNDARIES OF POLICE POWER are not susceptible of precise definition, and the courts therefore must, as each case is presented, determine whether it falls within or without the appropriate limits.

CONSTITUTIONAL LAW. — NO GENERAL POWER RESIDES IN THE LEGISLATURE TO REGULATE PRIVATE BUSINESS, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract.

CONSTITUTIONAL LAW. — STATUTES REGULATING THE PRICE FOR ELEVATING AND STORING GRAIN IN ELEVATORS are justifiable, because they are

charged with a public interest. The elements which affect this business with a public interest are found in its nature and extent, its relations to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it.

Spencer Clinton, for the appellant.

George T. Quinby, for the respondent.

ANDREWS, J. The main question upon this record is, whether the legislation fixing the maximum charge for elevating grain, contained in the act, chapter 581 of the Laws of 1888, is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing, and discharging grain, by means of floating and stationary elevators and warehouses in this state, at five eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, "lake vessels or propellers, the ocean vessels or steamships, and canal-boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than one hundred and thirty thousand population. The defendant, the manager of a stationary elevator in the city of Buffalo, on the nineteenth day of September, 1888, exacted from the Lehigh Valley Transportation Company, for elevating, raising, and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator the carrier was charged and compelled to pay four dollars for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator $1.75 a thousand bushels for the use of the steam-shovel, a part of the machinery connected with the elevator, operated by steam, and who, for their services and the expense of the steam-shovel, charge the carrier for each thousand bushels of grain shoveled the sum of four dollars. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count charging a violation of the first section in two particulars, viz.: In exacting more than the statute rate for elevating the cargo, and exacting more

than the actual cost for shoveling the grain to the leg of the elevator. Before reaching the main question, there is a subordinate question to be considered.

The defendant on the trial raised the question of the constitutionality of the act of 1888, and also insisted that, as to the alleged overcharge for shoveling, the facts did not show that the defendant had received anything for that service, or that the cargo had been charged more than the actual cost, and excepted to the submission to the jury of that branch of the case. The trial judge overruled both points, and submitted the case to the jury in both aspects, who found a general verdict of guilty, and thereupon the court imposed upon the defendant a fine of $250. It is now urged that, assuming the constitutionality of the act of 1888, the judgment should be reversed, for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving thereout, from the union, the rent agreed for the use of the steam-shovel. There are two answers to this proposition. The words "actual cost," used in the statute, were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners were permitted to separate the services, and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby, under color of charging for the use of the steam-shovel, exact of the carrier a sum for elevating beyond the rate fixed by the act. The second answer to the proposition is this: It was undisputed that the defendant exacted a greater charge for elevating than the sum allowed by the act. This was proven by testimony on the part both of the prosecution and the defendant. The verdict of guilty was followed by the infliction of the lowest penalty for a single offense. The verdict and sentence were justified, without considering whether an offense was made out under the second allegation in the indictment. No question as to the form of the indictment was made. The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of a judgment, where there is a general verdict, and the sentence

is single, and is appropriate to either of the counts upon which the conviction was had: *Polinsky* v. *People*, 73 N. Y. 65. Even if the alleged overcharge for shoveling was not made out, the verdict and sentence are supported by the findings of the jury on the other branch of the case, and the refusal of the judge to withdraw from the jury the consideration of the question whether there was an overcharge for shoveling did not prejudice the defendant.

Passing this point, we come to the main question, whether legislative power, under the state constitution, exists in the legislature to prescribe a maximum charge for elevating grain by stationary elevators owned by individuals or corporations, who have appropriated their property to this use, and are engaged in this business. The ascertainment of the exact boundaries of legislative power under the rigid constitutional systems of the American states is in many cases attended with great perplexity and difficulty. The people have placed in the constitution a variety of restrictions upon legislative power, and chief among them is that which ordains that no person shall be deprived of life, liberty, or property without due process of law. There is but little difficulty in determining the validity of a statute under this constitutional principle in cases where the statute assumes to divest the owner of property of his title and possession, or to actually deprive him of his personal liberty. The state may lawfully take the property or life of the citizen without infringement of the constitutional guaranty. The cases where the right of property is set aside by positive laws are various. Distress, executions, forfeitures, taxes, are of this description, "wherein," said Lord Camden, in *Entick* v. *Carrington*, 19 How. St. Tr. 1066, "every man, by common consent, gives up that right for the sake of justice and the common good." The state may directly take private property for public use on the condition of making compensation, and the cases where it may be taken in satisfaction of public and private obligations, or for the support of government, or as a return for governmental protection, are determined by general rules, well understood and easily applied. The difficulty in the application of the constitutional principle arises, in the main, in respect to that class of legislation, not infrequent, which, while it does not, in a strict sense, deprive an individual of his property or liberty, does, nevertheless, in many cases, by the imposition of burdens and restrictions upon the use and enjoyment of property, and by

restraints put upon personal conduct, seriously impair the value of property, and abridge freedom of action. The validity of legislation of this kind, to some extent, and within certain limits, is questioned by none. But such legislation may overpass the boundaries of legislative power, and violate the constitutional guaranty; for it is now an established principle that this guaranty protects property and liberty, not merely from confiscation or destruction by legislative edicts, but also from any essential impairment or abridgement not justified by the principles of free government. This court has recently, in several notable instances, vindicated the rights of individuals against unjust and arbitrary legislation restraining freedom of action, or imposing conditions upon private business, not warranted by the constitution: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 399; 4 Am. St. Rep. 465. But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all. This power of government,—the power, as expressed by Taney, C. J, in *License Cases*, 5 How. 583,—"inherent in every sovereignty, —the power to govern men and things," is not, however, an uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body. But within its legitimate domain the power is original, absolute, and indefeasible. It vested in the legislative department of the government at its creation, without affirmative grant or definition, as an essential political power and attribute of government, and personal rights and rights of property are subordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property, or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws. It was designed for the protection of personal and private rights against encroachments by the

legislative body not sanctioned by the principles of civil liberty as held and understood when the constitution was adopted. The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British Parliament is not the test of legislative power under the written constitution of the American states. But the great landmarks of civil liberty embodied in our state constitutions were established by our English ancestors, and upon questions such as the one now before us, we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation and legal adjudications, are pertinent and important considerations and elements in the determination of the controversy.

The act in question regulates the price of elevating grain, and the regulation affects the compensation which may be lawfully demanded for labor and personal services, as well as for the use of property. It fixes a maximum charge for labor and the use of property when combined, as they of necessity are in the business of elevating grain. The operation of the statute is by its terms limited to the business carried on in cities and towns having a population of not less than one hundred and thirty thousand, practically to the cities of Buffalo, New York, and Brooklyn. The circumstances, also, substantially restrict the application of the act to grain brought to Buffalo from the upper lakes by water, and there, by means of elevators, transshipped into canal boats and transported through the Erie Canal and Hudson River to the harbor of New York, and there discharged by elevators into warehouses or ocean vessels. The business of transporting grain by the lakes, and thence by the Erie Canal to New York, is one of great magnitude. The case shows that about one hundred and twenty millions of bushels of grain annually come to Buffalo from the west. The business of elevating grain at that point is mainly connected with lake and canal transportation. It is shown by official records that the receipts of grain at New York in the year 1887, by way of the Erie Canal and Hudson River, during

the season of canal navigation, exceeded forty-six million bushels, an amount very largely in excess of the amount received during the same period by rail and by river and coastwise vessels. The elevation of this grain from lake vessels to canal-boats takes place at Buffalo, where the case shows there are thirty or forty elevators, stationary and floating. How many of these elevators are actually employed in the business does not appear. The record is silent as to many facts which might tend to explain the relation of this business as actually conducted to the public interests. It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges, by fixing a uniform tariff and pooling the earnings, and dividing them ratably among all the elevator owners, although but a part of the elevators are actually operated. (See report of the committee on foreign commerce of the Chamber of Commerce of New York, made in April, 1885.) There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both lake vessels and canal-boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available for the erection of stationary elevators.

The case of *Munn* v. *Illinois*, 94 U. S. 113, is a direct authority upon the question now before us. That case was brought to the United States supreme court on a writ of error, to review a judgment of the supreme court of the state of Illinois, which affirmed the constitutionality of a statute of that state fixing a maximum charge for the elevation and storage of grain in warehouses in that state. The act was challenged as a violation of the constitutional guaranty, in the constitution of Illinois, protecting life, liberty, and property, expressed in substantially the same language as in the constitution of this state. The supreme court of the United States affirmed the judgment of the state court, on the ground that the legislation in question was a lawful exercise of legislative power, and did not infringe the clause in the fourteenth amendment of the constitution of the United States, "nor shall any state deprive any person of life, liberty, or property without due process of law." The legislation in question in *Munn* v. *Illinois*, *supra*, was similar to and is not distinguishable in principle from the act (Laws of 1888, c. 581) now under review. The question in that case was raised by an individual owning

an elevator and warehouse in Chicago which had been erected for and in connection with which he had carried on the business of elevating and storing grain for many years prior to the passage of the act in question, and prior, also, to the adoption of the amendment of the constitution of Illinois in 1870 declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The case of *Munn* v. *Illinois*, *supra*, has been referred to by this court in several cases: *People* v. *Boston etc. R. R. Co.*, 70 N. Y. 569; *Bertholf* v. *O'Reilly*, 74 Id. 509; 30 Am. Rep. 323; *Buffalo etc. R. R. Co.* v. *Buffalo etc. R. R. Co.*, 111 N. Y. 132; *People* v. *King*, 110 Id. 418; 6 Am. St. Rep. 389. In *People* v. *Boston etc. R. R. Co.*, *supra*, which related to the power of the legislature to compel the defendant to build a bridge at a point where the railroad of the defendant crossed a highway, the court, by Earl, J., said: "The whole subject of the legislative power over railroads, and even private persons, holding and using their property for public purposes, has been so fully discussed recently in the supreme court of the United States in the Granger cases and in the Chicago Elevator case as to make further discussion unnecessary here. Such legislation violates no contract, takes away no property, and interferes with no vested right." In *Bertholf* v. *O'Reilly* the case of *Munn* v. *Illinois*, *supra*, was cited as illustrating the scope of the police power in legislation. In *Buffalo etc. R. R. Co.* v. *Buffalo etc. R. R. Co.*, which involved the validity of an act of the legislature to regulate and reduce the fare on street-railways in the city of Buffalo, which it was claimed affected a contract entered into between two of the companies prior to the passage of the act, this court affirmed the validity of the law, and Ruger, C. J., in pronouncing the opinion of the court, quoted the language of Waite, C. J., in the Munn case, and also the language of Bradley, J., in *Sinking Fund Cases*, 99 U. S. 747, declaring the principle decided in the Munn case, and these quotations were quite irrelevant unless the doctrine stated therein was intended to be approved. In *People* v. *King*, the doctrine of the Munn case was applied by this court to uphold the validity of a statute which prohibited the exclusion of any citizen from theaters or other places of amusement, by reason of race, color, or previous condition of servitude, and a conviction in that case was sustained, where the defendant, the proprietor of a skating-rink, erected on his own property, opened it to the public, but excluded therefrom, on the occasion of a public

entertainment, on the ground of race and color, a colored person who sought admission. The court is not concluded by these cases, or any of them, from re-examining the principle on which the decision in *Munn* v. *Illinois*, *supra*, proceeded, but we cannot overrule and disregard that case without, as I think, subverting the principle of our decision in the King case, and certainly not without disregarding many deliberate expressions of this court in approval of the principle of that decision.

It is an interesting question as to what consideration should be given by a state court to a decision of the supreme court of the United States upon a question of constitutional law, rendered in the exercise of its jurisdiction, where the point in judgment relates to the validity of a state statute, which is challenged on the ground that it deprives a party of life, liberty, or property without due process of law, and the decision affirms the constitutionality of the statute. The jurisdiction of the supreme court of the United States to review the decision of a state court, sustaining a state statute which is alleged to be a violation of this constitutional principle, originated with the adoption of the Fourteenth Amendment of the constitution of the United States, which, for the first time, introduced into the federal constitution the prohibition, "nor shall any state deprive any person of life, liberty, or property without due process of law." This was a new limitation in the federal constitution on the state governments. Prior to the adoption of the Fourteenth Amendment, personal rights and rights of property were, as a rule, exclusively matters of state cognizance, and the state courts were the ultimate tribunals for the determination of questions arising under the constitutional guaranty of life, liberty, and property, which was found only in the state constitutions. Their decisions were not subject to review in the courts of the United States: *Slaughter-house Cases*, 16 Wall. 36. There were exceptions growing out of article 1, section 10, of the federal constitution, that "no state should pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," not material here. Since the Fourteenth Amendment, the question whether a state statute infringes the constitutional guaranty protecting life, liberty, and property, where it arises in a state court, involves the consideration of both the federal and state constitutions, although the ground of construction and decision is identical under either instrument. But whether the decision of the state court presents a federal question reviewable

on appeal to the supreme court of the United States depends on the nature of the decision of the state court; that is to say, whether it affirmed the validity of the statute, or held it to be unconstitutional and void. If the state court decides that the statute does violate the constitutional guaranty, its decision is now, as before the Fourteenth Amendment, final and conclusive, and no appeal can be taken to the federal court, as in that case no right under the constitution and laws of the United States has been denied. If, on the other hand, the state court sustains the statute, and denies the right asserted, the federal jurisdiction attaches, and an appeal may be taken to the United States supreme court. It cannot be maintained, we think, that a decision of the federal court sustaining a state statute is *res adjudicata* and binding upon a state court, when the same question subsequently arises there under a similar statute. It would still be the duty of the state court to examine the question, and decide it according to its interpretation of the constitutional guaranty. But the respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the states, the ultimate vindication of liberty and property against arbitrary and unconstitutional state legislation, and the fitness of things, emphasize and enforce in the particular case the settled rule that only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute to be unconstitutional. "On more than one occasion," said Chief Justice Marshall in *Dartmouth College* v. *Woodward*, 4 Wheat. 625, "this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution."

The power of the legislature to regulate the charge for elevating grain, where the business is carried on by individuals upon their own premises, depends upon the question whether the regulation falls within the scope of what is called the police power, which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest, may be affected by it, and be brought within its influence. Under this power, the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways,

through its pervading and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits. "It is much easier," said Chief Justice Shaw, in *Commonwealth* v. *Alger*, 7 Cush. 53, "to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."

In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business, are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left

to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty.

The justification of the statute of Illinois, regulating the charge for elevating and storing grain in the elevators of that state, was placed in the Munn case upon that principle of the common law stated by Lord Hale in his treatise De Portibus Maris, 1 Hargrave's Law Tracts, 78, that when private property is "affected by a public interest, it ceases to be *juris privati* only." The principle of the decision is stated with great perspicuity by Bradley, J., in his opinion in *Sinking Fund Cases*, *supra*. He says: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." The elevators in Chicago had no legal monopoly in the business of elevating grain. The business was open to all comers, but the location of the elevators, their connection with the railroads, on which most of the grain from the grain-producing states and territories of the west and northwest was brought to Chicago, the necessity of using them in the transfer, storing, and transshipment of grain, created, as was held by the court, a virtual and practical monopoly which affected the business and property with a public interest, and subjected them to regulation by law. The application of the language of Lord Hale and of the principle that private property may, by its uses, cease to be *juris privati* strictly, and become affected by a public interest, to the business of elevating grain in Chicago, was combatted and denied by Field, J., in his very able and forcible dissenting opinion. "It is," he declared, "only where some privilege in the bestowment of the government is enjoyed in connection with [private] property, that it is affected by a public interest in any proper sense of the terms. It is the public privilege connected with the use of the property which creates the public interest in it." There can be no doubt that where the government confers a special privilege upon a citizen, not of common right, it may annex such conditions upon its enjoyment as it sees fit. Nor can there be

any question that where an individual has a legal monopoly to use his property for a public purpose, and the public have an interest in the use, he is subject to an obligation cast upon him by the common law to demand only a reasonable compensation for the use.

This is stated with great clearness by Lord Ellenborough in *Allnutt* v. *Inglis*, 12 East, 527. "There is," he said, "no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises, and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." But the question is, whether the power of the legislature to regulate charges for the uses of property, and the rendition of services connected with it, depends in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business. Lord Hale, in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn case, used the language that when private property is "affected with a public interest, it ceases to be *juris privati* only," in assigning the reason why ferries and public wharves should be under public regulation, and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing-places on both sides of the stream, without a charter from the king or a prescription, time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business in which the whole community were interested could be regulated. In other words, it was simply one mode of exercising a prerogative of government,—that is to say, through the sovereign, instead of through Parliament,—in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord Kenyon, in *Rorke* v. *Dayrell*, 4 Term Rep.

410, said: "The prerogatives of the crown are not given for the personal advantage of the king; but they are allowed to exist because they are beneficial to the subject." And it is said in Chitty on Prerogatives, 4: "The splendor, rights, and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject." And Lord Hale, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord Hale says, could not be taken without lawful title by charter or prescription: De Portibus Maris, 77. But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls; nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord Hale is explicit upon both these points: "If the king or subject have a public wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the statute of 1 Elizabeth, chapter 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc. Neither can they be enhanced to an immoderate degree; but the duties must be reasonable and moderate, though settled by the king's license or charter." The contention, that the right to regulate the charges of ferry-men or wharfingers was founded on the fact that tolls could not be taken without the king's license, does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he, by express license, authorize the taking of more. The language of Lord Hale, that private property may be affected by a public interest, cannot justly, we

think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign.

The control which, by common law and by statute, is exercised over common carriers, is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not, in every case, depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted in England and in this country fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers, until recent times, was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The state conferred no franchise, and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers, and the subjection of the business to public regulation, were based on the character of the business, or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment": Jones on Bailments, appendix. It is only a public employment in the sense of the language of Lord Hale, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law, that common carriers must serve the public for a reasonable compensation, became a part of the law of this state, and from the adoption of the constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn case, which was cited with approval on this point in *Sawyer* v. *Davis*, 136 Mass. 239; 49 Am. Rep. 27. It

accords with the language of Chief Justice Shaw in *Commonwealth* v. *Alger*, *supra:* "Whenever there is a general right on the part of the public, and a general duty of the landowner or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is reserved by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature, in such cases, to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter, the legislature may, nevertheless, interfere and prescribe or limit the charges of railroad corporations: *Granger Cases*, *supra; Dow* v. *Beidelman*, 125 U. S. 680; Earl, J., in *People* v. *Boston etc. R. R. Co.*, *supra;* Ruger, C. J., in *Buffalo etc. R. R. Co.* v. *Buffalo Street Railroad Co.*, *supra.* The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state, in constituting a corporation, may prescribe or limit its powers, and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchises are the duties and obligations imposed by the act of incorporation. But when a corporation is created, it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid

exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection has been bestowed.

It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which, in former times, extended to the details of personal conduct, and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society, and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which, by legislation, would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty,—liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie Canal and Hudson River to the seaboard at New

York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie Canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a waterway between Lake Erie and the Atlantic Ocean, set forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures, and commerce, mitigate the calamities of war, and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States."

In the construction and enlargement of the canal, the state has expended vast sums of money raised by taxation, and, finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it more, perhaps, than to any other single cause, is it owing that the city of New York has become the commercial metropolis of the Union. Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of

transportation which shall enhance the cost of the necessaries of life, or force the trade in grain into channels outside of our state. In *Hooker* v. *Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, the court was called upon to consider the validity of an agreement between certain transportation lines on the canals to keep up the price of freights. The court held the agreement to be illegal, and Jewett, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." The same question came up a second time in *Stanton* v. *Allen*, 5 Denio, 434, 49 Am. Dec. 282, and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense as facilities to trade and commerce, and to foster and encourage agriculture, and are, at the same time, a magnificent source of revenue, whatever concerns their employment and usefulness deeply involves the interest of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chitty on Prerogatives, 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases alloted to the king by the constitution"; and many governmental powers vested in the sovereign in England have, since our Revolution, devolved on the legislatures of the states. The statutes of England in earlier times were full of oppressive commercial regulations, now, happily, in great part abrogated; but that the interests of commerce are matters of public concern, all states and governments have fully recognized. The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix

and maintain an exorbitant tariff of charges, and to bring into the combination any new elevator which may be erected and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists, the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal-boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists, the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said Chase, C. J., in *License Tax Cases*, 5 Wall. 469, "can know nothing of public policy, except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord Hale, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferry-men, innkeepers, hackmen, and interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries, because the right to establish a ferry is a franchise, and therefore the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the bed of navigable streams, the title to which was in the sover-

eign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute, it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferry-men were made subject to public regulation is, that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the bed of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between the wharves built upon the bed of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the bed of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord Hale on the ground of a virtual as distinguished from a legal monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit conferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is, that the prohibition, as well as the regulation of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is, that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circum-

stances, collectively, create an exceptional case, and justify legislative regulation.

The case of *Munn* v. *Illinois*, *supra*, has been frequently cited with approval by courts in other states: *Nash* v. *Page*, 80 Ky. 539; 44 Am. Rep. 490; *Hackett* v. *State*, 105 Ind. 250; 55 Am. Rep. 201; *Chesapeake & P. Tel. Co.* v. *Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; *Davis* v. *State*, 68 Ala. 58; 44 Am. Rep. 128. In *Nash* v. *Page*, *supra*, it was held, upon the doctrine of the Munn case, that warehousemen for the public sale and purchase of tobacco in Louisville exercised a public business, and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In *Hackett* v. *State*, *supra*, it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were, in legal contemplation, devoted to public use. In *Chesapeake etc. Tel. Co.* v. *Baltimore etc. Tel. Co.*, *supra*, legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn case.

The criticism to which the Munn case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the case of *People* v. *King*, 110 N. Y. 418, 6 Am. St. Rep. 389, it was given a much broader scope, and was held to be efficient to prevent discrimination on the ground of race and color in places open for public entertainments. In that case, the owner of the skating-rink derived no special privilege or protection from the state. The public had no right, in any legal sense, to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that, so long as he devoted his place to purposes of public entertainment, he subjected it to public regulation. There is little reason, under our system of government, for placing a close and narrow interpretation

on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty, and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement, which has been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power, and invested it with the prerogative of bringing every legislative act to the test of the constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which, sooner or later, is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberrations may have marked its course. So, also, in that wide range of legislative powers over persons and property which lie outside of the prohibitions of the constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life-blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy, if, at the bottom, the legislation under it is oppressive and unjust. The remedy, by taking away the power of the legislature to act at all, would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules, a danger is introduced into our system which would, we think, be far greater than results

from an occasional departure by the legislature from correct principles of government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature.

The judgment should be affirmed.

FROM THE FOREGOING OPINION GRAY AND PECKHAM, JJ., dissented, and each wrote an opinion expressing his dissent. The former said, in substance, that while the opinion of the majority of the court was based upon the ground that the statute in question was within the proper limits of the police power, it was impossible for him to perceive that it was within these limits; that the statute conflicted with the provision of the constitution guaranteeing to each individual that he should not be deprived of life, liberty, or property without due process of law; that the business of conducting elevators was one in which the owners owed nothing to the state for privileges, powers, or assistance conferred; that the government had no concern in the price which one individual might demand of another who resorts to him because of his superior business skill or facilities; that it was not compulsory for the public to resort to the elevators, nor was their business exclusive nor beyond competition; that if the door is opened to this class of legislation, there would be no protection against socialistic laws, and that nothing would prevent the legislature from interfering with any other kind of private enterprise, which, from improved methods of its conduct, and for peculiar reasons, appears to monopolize that branch of business.

"The legislature, in effect, says to the individual, when interfering to regulate the charges he may make in his business: It is true, you are a private individual, engaged in a private and legitimate business, in the prosecution of which you are authorized and protected by the constitution; but, nevertheless, we think, in the public interest, because your business has become so advantageous and so necessary to a large portion of the public, because of its superior facilities, that you shall not be allowed to pursue it, unless you reduce your charges to a rate fixed by us. As well may the legislature claim a right to interfere to reduce and regulate the charges which a combination of manufacturers has fixed for a certain line of goods.

"It seems to me that the theory of such legislation is a startling departure from the true conception of governmental functions. They should work to protect and develop private rights, and to secure to all individuals the uniform operation of the constitutional guaranties. The police power is incapable of being stretched to reach such a case as this, if we have any respect for the provisions of the constitution. That power is properly exercised in the preservation of the private rights of individuals, in the maintenance of public order, in the supervision of public health and morals, and in the prevention of a conflict of rights. Its justification for interference with a

private, legitimate business is admissible only when that business may be said to be affected by a public use, or interest, by reason of some aid, grant, or privilege conferred by the state. Judge Cooley says, in his valuable work on constitutional limitations, page 739: 'The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation.'

"This act, in my opinion, was an unconstitutional exercise of power by the legislature. Such legislation was not demanded by the general welfare, and it violates the social compact under which we live. It is a subversion of the constitutional guaranty. It is against such legislation that the constitutional guaranty was framed, and that the judicial power was intended by the constitution to afford protection to the individual."

Judge Peckham, in his dissenting opinion, first considered whether the courts of the state of New York were bound to affirm the constitutionality of the statute in question, because a similar statute had been upheld in *Munn* v. *Illinois*, 94 U. S. 113, as not violating the clause of the constitution of the United States, substantially like the clause in the constitution of New York, upon which the defendants relied in the present case; and he reached the conclusion that as the decision of the state court denying the validity of the statute upon the grounds of its conflict with the constitution could not be reviewed by the national courts, that the decisions of those courts need not be followed where they affirm the constitutionality of the statute, and the state courts may nevertheless conclude that such statute was an encroachment upon the constitutional rights of its citizens, and therefore should be declared void.

The judge, in his opinion, referred to the cases of *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, *Boardman* v. *Lake Shore etc. R'y Co.*, 84 N. Y. 157, *People* v. *King*, 110 Id. 418, 6 Am. St. Rep. 389, *Buffalo etc. R. R. Co.* v. *Buffalo Street R. R. Co.*, 111 N. Y. 132, to show that while each of them cited the Munn case, none of them necessarily asserted the correctness of the principles upon which it rests.

The judge denied that property could properly be regarded as devoted or dedicated to a public use merely because the owner has embarked it in a business in which large numbers of the public are interested; and he denied that any person has a virtual or any monopoly in his business unless it rests upon the ground of a grant from the sovereign power merely because the property is conveniently situated for the business, and it would cost a large amount of money to duplicate it. "So long as every one is free to go into the same business, and invest his capital therein, with the same rights and privileges as those who are already engaged in it, there can be no monopoly in a legal acceptance of that term, virtual or otherwise."

He insisted that no one could be regarded as devoting his property to public use so as to entitle the public to control it, or the price to be charged, except when he received some license or privilege from the public or from the sovereign power, and that all the instances which had usually been relied upon as sustaining the regulation of prices had arisen where the person whose prices were regulated had received some privilege, and impliedly agreed as a part of the consideration for the privilege to submit to such regulation. The right to regulate hackmen and cartmen rested upon their being conceded the privilege to stand in the public streets, and to there exercise their calling. And in the case of ferries, also, the right to establish them rested exclusively in the crown or in the people, and therefore, when

established, the right of regulating or limiting the tolls remains in the sovereignty granting the right to maintain the ferry. So the ancient right of regulating the toll which millers might charge rested upon the right which, at common law, the lord of the manor had to compel all his tenants to grind their corn at his mill, and to prevent any one setting up another mill unless licensed by him or by the crown. A common carrier, the judge conceded, also exercised a kind of public office, and by holding himself out to the public as a common carrier, thereby granted to the public such an interest in his business that each individual had the legal right to demand the carriage of his property upon payment or tender of reasonable compensation for such carriage; but he denied that there was any satisfactory ground upon which the power might be based to regulate or limit the price of transportation by a common carrier, and the price of entertainment by an innkeeper who was a private individual, and had received no privileges from the state of any kind.

After showing that the Munn case had met with much criticism on the part of judges and text-writers, the judge closed his consideration of the case before the court in the following language: —

"It has been frequently said that the police power rests for its foundation upon the general duty of each citizen to so use his property as not to interfere with the fair and proper use by his neighbor of his property, and to protect and guard the public health and morals. The power to regulate or limit the price for the use of property situated like that in this case comes within no fair definition of such power, nor does it belong to the category of things that should be regulated, in order that another may properly enjoy his own property, or that the public health or morals may be protected.

"An examination of the cases now before us, in view of these observations, will show, as I think, that these defendants have never devoted their property to a public use, so that the public had a right to require their service, and that they have received no immunity or privilege from the state, upon which this claimed right of limitation can be imposed as a condition to its exercise.

"These defendants are the owners or lessees of certain elevators or warehouses, used in the harbor of New York for the purpose of transferring grain from one vessel to another, from canal-boat to steamship, or from boat to rail-car, or for the storing of grain. They are not a corporation, nor have they received any special privilege from the state in regard to their business, nor are they engaged in a business which is not absolutely free to any one who wishes to use his property in the same way. They have no special right to use the waters within the jurisdiction of the state in a manner not equally open to every citizen, not only of the state, but of the United States. The state furnishes them no special facilities for the carrying on of their business, and they are under no obligations to it for any protection to their business or property, other than such as is given by and is due from the state to all the inhabitants thereof, viz., the duty of protection to their persons and property while they are lawfully engaged in their occupations. They are under no legal duty to engage in such occupation for all who may come and ask them. They have the perfect right to refuse to elevate, by means of their elevators, a bushel of grain for A, and at the same time they have the right to use such elevators to elevate the grain of B. They have the equal right to refuse to store the grain of any or of all persons. I fail entirely to see how such a business can be said to be one in which the public have an interest in the way of a right to limit, through legislation, the price for which such business shall be done.

"The defendants are situated entirely differently from the elevator owners in Chicago whose rights were adjudicated upon in the Munn case. The canal-boats loaded with grain, after their passage down the Hudson River, seek the owners of the storehouse in which to store the same until wanted, or the floating elevator is sought for and found, and employed to unload the cargo of the boat into the hold of the steamship. There are large numbers of warehouses and elevators which are in no way connected with each other. In neither case is there anything like what can be called a monopoly, virtual or otherwise; the utmost stretch of the imagination cannot so regard it. The warehouses are private property, and no one can enter upon them without the consent of their owners: *Wetmore* v. *Atlantic White Lead Co.*, 37 Barb. 70; *Wetmore* v. *Brooklyn Gas-light Co.*, 42 N. Y. 384.

"Still more plainly is this the case with a floating elevator. It is not a common carrier or wharfinger or warehouseman. It has no monopoly, virtual or otherwise, as to facilities of place, convenience of situation, or license or privilege from the state. In the nature of the business of both the warehouseman and the elevator owner, it is wholly private. Now, in what is the case made less strong when, instead of the scales or the mill, heretofore instanced, an elevator or warehouse is substituted? It is built by individuals or private partnerships, and occupied by them or leased to other private individuals or partnerships. It is built on lands owned by individuals, or it is in the substantial form of a boat, and floats on the public waters of the state, and its owners have received no kind of license, privilege, or immunity from the state, in any way special in its nature, or which is not common to all the people of the state. How, then, has the owner devoted it to a public use? It is claimed that he has done so because the elevator or warehouse is to be used to elevate or store a vast amount of grain which comes from the west seeking transportation through the Erie Canal; and because it costs a large amount of money to build such structures, and owing to the facility and cheapness with which the elevator does the work, as compared with the labor of individuals, those who own the grain, or those who are interested in its transportation, are compelled to use such elevator if they desire to successfully compete in the business of transportation and in the loading or unloading of such grain. Hence, it is said, a virtual monopoly exists, and the persons who own it are under the regulating power of the legislature as to their compensation. But I deny that there is any virtual monopoly. There was such in the case in 12 East (*supra*), because there was no right in any other owners of warehouses to receive the wines on storage, and the right existed in the dock-owners by virtue of a special grant from the sovereign. A monopoly in a business, where the persons engaged in it have no exclusive privilege, and into which business the whole world is at liberty to enter, and upon entering which they will be possessed of precisely the same rights and privileges as the others engaged in it, is a contradiction in terms. Loosely speaking, a person or corporation is said to have a virtual monopoly of a business when, on account of its great extent and the facilities it has for transacting it, arising from its large proportions, the article it manufactures or sells substantially takes possession of the market. Such, for instance, is the case in the manufacture and sale of matches. One company does an enormous business, and has almost what is called a monopoly in some parts of the country, arising, not from any special privilege or right granted to or exercised by it, but because of its facilities; and it is, therefore, enabled to make the article cheaper and sell it cheaper than its competitors. But would anyone suggest that the state has therefore a right to limit the price which the

company shall charge for matches? If it be a corporation, indeed, or if it has received any special privilege or right from the state, then conditions may be imposed upon it, although none can be simply because of the greatness of its sales or the number of the public interested in procuring cheap matches.

"But when the right of regulation as to compensation is spoken of, because the person has a virtual monopoly, the term has heretofore been used as indicative of some special privilege or franchise granted to the individual by the sovereign, which results in such virtual monopoly, and the right of such regulation exists by reason of such grant. No monopoly of that kind exists in this case. If it be said that the effect is the same, the answer is, that it is not the same. In the one case, the monopoly exists by reason of the action of the government, and no other citizen can come in and devote his capital and energy to such use. In the other, the monopoly exists only as long as other citizens choose to keep out of the business, and just as soon as it is seen that the least degree over the ordinary profit can be realized by an investment in elevator property, just that moment capital will flow into that channel, and probably away from some industry where the average rate of profit has ceased to be made. Thus in one case the result cannot be avoided or in any way altered, excepting by the action of the sovereign, while in the other case it may be altered by the action of the ordinary laws of trade. The effect, while it lasts, may possibly be the same in both cases, but in the one it is arbitrary and dependent upon the government, and in the other subject to alteration according to general commercial rules. But in this case there is no pretense of a monopoly grounded upon lack of ability in the public to compete. On the contrary, the complaint is, that the competition has been so fierce, and the numbers of those engaged in the business so great, that they have combined to fix upon prices below which they would not work, and it is in realty the combination of which complaint is made. If the prices for doing the work are higher than is reasonable, owing to such combination, the combination itself may be illegal: See *Hooker* v. *Vandewater*, 4 Denio, 349; 47 Am. Dec. 258; *Stanton* v. *Allen*, 5 Denio, 434; 49 Am. Dec. 282; and, as has been said, the persons engaged in it may render themselves amenable to the criminal laws of the state, but no power of the state to limit the price for which a person may sell his property, or the use of it, results from a violation of the law against conspiracies or combinations to raise illegally the prices of articles or the charges for services which have a commercial value.

"It is said, however, that the defendants have received some privileges or benefits from the state in their business of elevating or storing grain, because the state has built the Erie Canal and spent large sums of money for that purpose, and the business of elevating grain into and out of a canal boat, or of storing it, is made much greater than would be possible but for the constant maintenance of the canal by the state; and if the state should cease to maintain the canal, the business of transporting grain over it would be wholly destroyed, and therefore it must be conceded that the business of elevating grain receives support from the public, and it is only through such support that the business can exist. It is difficult, as it seems to me, to regard this argument seriously. The state, it is thus said, has built a canal, and there are men (not the defendants) who propose to avail themselves of its existence, and to transport merchandise in their boats over its waters. Before undertaking such transportation, however, they must load their boats or unload them after such transportation is finished, and in the process of loading or unloading their boats in the public waters of the state, they hire the

defendants to do the elevating of the cargo. If the canal had not been built, there would have been no boatmen with canal-boats asking for cargoes, and, consequently, the defendants would not have had the opportunity of loading their vessels; therefore the state has conferred a privilege upon the defendants, by using which they acquiesce in the right of the state to limit the amount of compensation they can lawfully demand for the use of their own property. The mere statement of the proposition, it seems to me, is its best refutation. To argue upon it would seem to admit that it is debatable. By reason of the action of the state in building the canal, more frequent opportunities have arisen from which the defendants have been enabled to engage in a certain kind of labor, and to invest their capital in certain kinds of property, but not a privilege, immunity, or franchise of any description has the state granted to them, even by the loosest construction of language.

"The legislation in question is nothing else than an effort, not only to regulate the private business of private individuals, but to limit the amount for which they shall exact compensation for the use of their own property, in which the public has no interest whatever, in the legal meaning of that term. If it is legal in this case, it is legal in any. The legislature can step in and limit the prices of every article of commerce, the product of the field, the mine, or the manufactory. There is seemingly no length to which it may not go, and no home to which this power may not be applied, in matters of the most individual and private nature, and all under the guise of legislation for the public good and the general welfare.

"It is true that the question of the validity of this law is one of power, and not of propriety; and if the legislature, in any case, may have, under any circumstances, the power to limit the compensation which a private individual may receive for the use of his own property, not devoted to a public use, and in regard to which he receives and exercises no special privilege or immunity from the state, then we are bound to suppose such circumstances to exist in the case before the court. We are of the opinion that the legislature has no such power.

"There is no foundation for the argument that the elevator owners have a monopoly because they have their charges fixed by the produce exchange, which only recognizes as regular the warehouse receipts given by elevator owners or warehousemen who are members of that body. If that be the fact, it constitutes in no view of the subject a monopoly. What has already been said upon the subject applies in equal degree to such an argument; nor have the defendants thereby received any privilege or franchise from the state.

"The disposition of legislatures to interfere in the ordinary concerns of the individual, as evidenced by the laws enacted by parliaments and legislatures from the earliest times, and the futility of such interference to accomplish the purposes intended, have been the subject of remark by some of the ablest of English-speaking observers. Buckle, in his History of Civilization in England, in speaking of the course of English legislation, says: 'Every great reform which has been effected has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed have been those by which some former laws have been repealed.' And again: 'We find laws to regulate wages; laws to regulate prices; laws to regulate profits; laws to regulate the interest of money; custom-house arrangements of the most vexatious kind, aided by a complicated scheme, which was well called the sliding scale, — a scheme of

such perverse ingenuity that the duties constantly varied on the same article, and no man could calculate beforehand what he would have to pay. A system was organized, and strictly enforced, of interference with markets, interference with manufacturers, interference with machinery, interference even with shops. In other words the industrious classes were robbed in order that industry might thrive': 1 Buckle's History of Civilization in England, 199, 200.

"The legislation under review is of the same general nature. To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world. We shall have a recurrence of legislation which, it has been supposed, had been outgrown not only as illegal, but as wholly useless for any good effect, and only powerful for evil. Contests of such a nature are productive only of harm. The only safety for all is to uphold, in their full vigor, the healthful restrictions of our constitution, which provide for the liberty of the citizen, and erect a safeguard against legislative encroachments thereon, whether exerted to-day in favor of what is termed the laboring interests, or to-morrow in favor of the capitalists. Both classes are under its protection, and neither can interfere with the liberty of the citizen without a violation of the fundamental law.

"In my opinion, the court should not strain after holding such species of legislation constitutional. It is so plain an effort to interfere with what seems to me the most sacred rights of property, and the individual liberty of contract, that no special intendment in its favor should be indulged in. It will not, as seems to me plain, even achieve the purposes of its authors. I believe it vain to suppose that it can be other than of the most ephemeral nature at its best, or that it will have any real virtue in altering the general laws of trade, while, on the other hand, it may ruin or very greatly impair the value of the property of wholly innocent persons. If the compensation limited by the act is not sufficient to permit the average rate of profit upon the capital invested, it will result either in its evasion, or else the work will not be done, and the capital employed will seek other channels where such average rate can be realized, or the property will become of little or no value. If the compensation be sufficient, the same result aimed at would soon follow from the general laws of trade, from the law of supply and demand, and the general cost of labor and materials.

"Every one having the same right to build an elevator or warehouse that these defendants have, and upon its completion to employ it in the same business if the rate of profit is above the average capital, if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the work offered, and then, by the competition of capital, the rate of compensation would come down to the average. Such, at least, would be the tendency, and it could only be averted by combination among the owners of the property, which could not be long sustained in the face of perfect freedom to all to invest in such undertakings. That they are expensive, and require the outlay of a large amount of money to build and maintain them, and that the warehouses now existing may have an advantage in location, does not, as has been shown, make them a monopoly, but simply tends to make the inevitable result a trifle more slow in its approach than in other cases requiring a smaller outlay. If it be said that

there is already a superabundance of elevators, more than can be or are used, and that some of them lie idle while others do the work, and they all share in the profit; if the profit exceed what the owners of the grain, or those engaged in its transportation, can afford to pay, — the result will then be that the persons so engaged will cease from that kind of work, or else the owners of the elevators will reduce their charges. This reduction of charges will most surely take place before the owners of the elevators would allow the business to pass out of existence, provided the compensation, after such reduction, would enable them to realize the average rate of profit for their capital; while, if it would not, it would be conclusive proof that the business of transportation of grain or other commodities, where the boats were to be loaded or unloaded by elevators, could no longer be conducted with profit to all parties, and some new way would have to be discovered and put in practice; for capital will not seek investment or employment where the average rate of profit cannot be commanded, and men will not continue to transport grain or any other commodity at a loss, or upon such terms that they cannot earn a livelihood. If this is the case in the transportation of grain by the canal, owing to the competition of railroads and their ability to transport it cheaply and rapidly, then that fact must be faced. Such a business cannot be maintained for any length of time, by legislation, at the expense either of capital or of the transporter. Each must earn the average profit in the same general line of business, or the business must, from economical reasons, cease.

"The legislation under consideration is not only vicious in its nature, communistic in its tendency, and, in my belief, wholly inefficient to permanently obtain the result aimed at, but for the reason already given, it is an illegal effort to interfere with the lawful privilege of the individual to seek and obtain such compensation as he can for the use of his own property, where he neither asks nor receives from the sovereign power any special right or immunity not given to and possessed by other citizens, and where he has not devoted his property to any public use within the meaning of the law.

"The orders of the general and special terms of the supreme court should therefore be reversed, and the relators discharged."

In *Chicago etc. R'y Co.* v. *Minnesota*, 134 U. S. 418, and *Minneapolis etc. R'y Co.* v. *Minnesota*, 134 Id. 467, the power of the states to regulate the charges of common carriers was reconsidered and reaffirmed by the supreme court of the United States; but it was declared to be a power which could not be exercised arbitrarily, nor without giving the carrier an opportunity to be heard. The statute of Minnesota had committed the exercise of this power to a railway commission, and the supreme court of the state had construed the statute as making the rates fixed by the commission "not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse, except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and reasonable."

In delivering the opinion of the court, Mr. Justice Blatchford, at page 456, said: "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter of controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

"Under section 8 of the statute, which the supreme court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for the subject, and is complete in itself, all that the commission is required to do is, on filing with it by a railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt such charge as the commission 'shall declare to be equal and reasonable,' and to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission; in fact, nothing which has the semblance of due process of law; and although in the present case it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at.

"By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the supreme court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

"It is provided by section 4 of article 10 of the constitution of Minnesota of 1857, that 'lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use,' and that 'all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions and manufactures on equal and reasonable terms.'

It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the constitution of Minnesota.

"The issuing of the pre-emptory writ of *mandamus* in this case was therefore unlawful, because in violation of the constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the supreme court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court."

From this opinion justices Bradley, Gray, and Lamar dissented.

Justice Miller's concurring opinion was as follows: —

"I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

"1. In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage.

"2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.

"3. Neither the legislature nor such commission acting under the authority of the legislature can establish arbitrarily, and without regard to justice and right, a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases, there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to, both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare, as excessive, or establishing its right to collect the rates, as being within the limits of a just compensation for the service rendered.

"7. That until this is done, it is not competent for such individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

"8. But in the present case, where an application is made to the supreme court of the state to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing, by judicial proceeding, the reasonableness of the charges fixed by the commission, I think the court

has the same duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief that it would have if called upon so to do by a bill in chancery.

"9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

"10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice, and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the supreme court of Minnesota to receive evidence on this subject, I think the case ought to be reversed, on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just consideration of the statute of Minnesota, it is for that reason void."

FEDERAL DECISIONS. — In cases where a writ of error will lie to the supreme court of the United States, the decisions of that court are better precedents than the decisions of the appellate state courts upon the same questions: *San Benito County* v. *Southern P. R. R. Co.*, 77 Cal. 518; and upon questions concerning federal laws and the federal constitution, the decisions of the federal supreme court are binding upon the courts of the individual states: *Bressler* v. *County of Wayne*, 25 Neb. 468.

POLICE POWER. — The police power of a state embraces its system of internal regulation by which it seeks to preserve the public order, prevent offenses against the state, establish rules of good manners calculated to prevent conflict of rights, and insure to each man the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others: *People* v. *Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893, and note; such as the regulation of the sale and manufacture of articles supposed to injure the public: Note to *Butler* v. *Chambers*, 1 Am. St. Rep. 644–650; *State* v. *Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419, and note. It is not within the police power for a legislature to enact a law punishing a physician, who has been decided competent to practice, for advertising himself as a specialist in certain diseases: *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257.

IMPAIRMENT OF CONTRACTS. — The legislature cannot pass laws impairing the obligation of contracts: *Phinney* v. *Phinney*, 81 Me. 450; 10 Am. St. Rep. 266, and note.

SCHLUTER *v.* BOWERY SAVINGS BANK.

[117 NEW YORK, 125.]

DEPOSITOR IN SAVINGS BANK, WHOSE DEPOSIT IS ENTERED AS "IN TRUST FOR B," constitutes himself a trustee, and transfers the title to the fund from himself individually to himself as trustee.

PAYMENT TO AN ADMINISTRATOR OF A DEPOSITOR, in whose name moneys are deposited in trust for another, is good and effectual to discharge the bank, in absence of notice from the beneficiary.

PAYMENT TO A FOREIGN ADMINISTRATOR is a legal payment of a deposit which, by the by-laws of the bank, was payable to the personal representatives of the depositor in the event of his decease.

LETTERS OF ADMINISTRATION DO NOT BECOME VOID ON THE SUBSEQUENT DISCOVERY AND ADMISSION TO PROBATE OF A WILL. Until such letters are revoked, all persons acting in good faith are protected in dealing with the administrator.

CONFLICT OF LAWS. — A MARRIED WOMAN IS CAPABLE OF BEING A TRUSTEE UNDER THE LAWS OF THE STATE OF NEW YORK, and her removal to another state, after becoming a trustee in New York, does not divest her of her title as such trustee.

ACTION to recover moneys deposited with the defendant in October, 1872, by Margaret Knittel, then a married woman. The deposit was entered upon the books of the bank and the pass-book belonging to Margaret Knittel as follows: "Bowery Savings Bank, in account with Margaret Knittel, in trust for Antonette Knittel," who was then an infant six years of age, living with her parents in New York. They afterwards moved to New Jersey, where, in June, 1875, Margaret Knittel died. Letters of administration on her estate issued in the state of New Jersey to her husband, to whom, in October, 1875, as such administrator, the defendant paid the amount of money deposited by Mrs. Knittel, with interest. Afterwards, it was discovered that Mrs. Knittel had left a will, which, on the 17th of November, 1875, was admitted to probate in the county of New York, and letters testamentary were issued to Charles Sier, the executor named in the will. He demanded payment of the deposit to him, which was refused. In December, 1885, Antonette, while still residing in the state of New Jersey, died, and the plaintiff was afterwards, by the surrogate of New York, appointed to administer her estate. After his appointment, he demanded payment of the deposit, with interest, which was refused, and he thereupon brought the present action. Judgment in favor of the defendant was affirmed on appeal to the general term.

John McCrone, for the appellant.

Carlisle Norwood, Jr., for the respondent.

EARL, J. The defendant was incorporated by the act chapter 229 of the Laws of 1834, and by section 6 of that act it was provided that deposits therein should be repaid to each depositor when required, and at such time, and with such interest, and under such regulations, as the board of managers, from time to time, prescribe. One of the by-laws of the defendant, printed in the pass-book which was delivered to the depositor, provided that on the decease of any depositor the amount standing to the credit of the deceased should be paid to his or her legal representatives. We have several times held that by such a deposit the depositor constituted himself or herself a trustee, and that the title to the fund was thereby transferred from the depositor individually to the depositor as trustee; and in *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83, 38 Am. Rep. 498, a case entirely similar to this, we held that payment of the deposit to the administrator of the depositor, in the absence of any notice from the beneficiary, was good and effectual to discharge the savings bank; and it is unnecessary now to repeat the reasoning of the opinion in that case. Here there was no notice to the bank from the beneficiary, and the payment to the administrator of Mrs. Knittel was made in entire good faith.

But the claim is made that, because Mr. Knittel was a foreign administrator, deriving his authority from administration granted in the state of New Jersey, he was not the personal representative of the deceased, and therefore payment could not legally be made to him. Payment to the personal representative is good, because at the death of the intestate he becomes entitled to all his personal property wherever situated, and having the legal title thereto he can demand payment of choses in action; and a payment to him made anywhere, in the absence of any conflicting claim existing at the time, is valid. It is true that if the defendant had declined payment, the foreign administrator could not have brought action in this state to enforce it. But a voluntary payment to such an administrator has always been held valid. Therefore, in receiving this payment, Mr. Knittel was the representative of the deceased, and able to give an effectual discharge to the defendant: *Parsons* v. *Lyman*, 20 N. Y. 103; *Peterson* v. *Chemical Bank*, 32 Id. 21; 88 Am. Dec. 298; *Estate of Butler*, 38 N. Y. 397; *Wilkins* v. *Ellett*, 9 Wall. 740.

Mrs. Knittel, however, actually left a will, which was subsequently admitted to probate. But the letters of administra-

tion were not therefore void, the court having jurisdiction to grant them; and until they were revoked, all persons acting in good faith were protected in dealing with the administrator thus appointed. And so it has always been held: *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460; 20 Am. Rep. 555; 76 N. Y. 316; 32 Am. Rep. 309; *Kittredge* v. *Folsom*, 8 N. H. 98; *Patton's Appeal*, 31 Pa. St. 465. Here the payment was made before the will was admitted to probate, and, at the time of such payment, Mr. Knittel was the legal representative of the deceased, and authorized to administer upon her estate. Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will and its admission to probate render the prior appointment of an administrator absolutely void, so as to give no protection to persons who, in dealing with the administrator, have acted on the faith thereof: Woerner on Administrators, 568, 571, 588.

Under the act chapter 782 of the Laws of 1867, Mrs. Knittel, although a married woman, was capable of being a trustee. She constituted herself a trustee here, and here the trust fund remained, and therefore, although by the law of New Jersey a married woman could not be appointed a trustee, yet the trust could be enforced here. Her removal to that state did not divest her of the title to the fund she thus had, and that title remained in her, as no one was appointed to take it from her.

The statutes of New Jersey were proved, showing that the surrogate of the county of which Mrs. Knittel was an inhabitant and resident at the time of her death had jurisdiction to grant letters of administration upon her estate. While he had no authority to grant letters of administration unless she died intestate, intestacy, like inhabitancy, was one of the facts which he was to determine. He had general jurisdiction of the subject of administration, and having determined that she died intestate, he was authorized to grant administration upon her estate. The proceedings in the surrogate's court were properly exemplified and proved.

But the further claim is made, that the answer was insufficient to permit the laws of New Jersey to be read in evidence, for the reason that they were not therein alleged. It is there alleged "that Margaret Knittel died an inhabitant of and domiciled in and a resident of Hoboken, Hudson County, New Jersey; that thereafter, and on the 19th of October, 1875, let-

ters of administration on the goods, chattels, rights, and credits of Margaret Knittel, deceased, were duly issued to one Louis Knittel, the husband of the said Margaret Knittel, by the surrogate of the county of Hudson, state of New Jersey; that said surrogate had jurisdiction and was duly authorized and empowered by the laws of the state of New Jersey to issue said letters, as aforesaid." We think these allegations were sufficient to authorize proof of the laws of New Jersey, and of the jurisdiction of the surrogate in issuing letters. If the plaintiff desired more specific allegations, and was fairly entitled to them, he should have moved to make the answer more specific and definite. The answer gave him every information to which he was entitled. And he might, if he could, have shown that the surrogate had no jurisdiction, and that the laws did not authorize him to grant administration of the estate of Mrs. Knittel. So far as the case of *Throop* v. *Hatch*, 3 Abb. Pr. 23, may seem to hold the contrary doctrine, it does not receive our approval.

We are therefore of opinion that the judgment should be affirmed, with costs.

PAYMENT BY A SAVINGS BANK to the administrator of a depositor, whose account was "in trust for C. B.," upon production of letters of administration and the pass-book, is a valid and effectual discharge of the bank: *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83; 38 Am. Rep. 498; and to the same effect is *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450. So payment by a debtor to the administrator of his creditor, who has been duly and regularly appointed, is valid, even though the supposed intestate is actually alive, and for this reason the letters of administration are subsequently revoked: *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460; 20 Am. Rep. 555; but this rule does not govern where the granting of letters of administration upon the estate of a living person has been so irregularly done as to render the letters void: *Roderigas* v. *East River Sav. Inst.*, 76 N. Y. 316; 32 Am. Rep. 309; and, as a general rule, letters of administration, and all proceedings thereunder, issued upon the estate of a man represented as dead, but who is actually alive, are absolutely void: *Melia* v. *Simmons*, 45 Wis. 334; 30 Am. Rep. 746, and extended note, in which the doctrine of *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, is criticised.

PAYMENT TO FOREIGN ADMINISTRATOR. — Payment to a foreign administrator is good, although such administrator has neither given security nor recorded his letters of administration: *Deringer* v. *Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150. Payments voluntarily made to foreign administrators by debtors of a deceased person are held effectual in the courts of New York, upon the principles of state comity: *Vroom* v. *Van Horne*, 10 Paige, 549; 42 Am. Dec. 94; but comity of one state will not enforce laws of another state when such enforcement violates or infringes the rights of its own citizens: *Deringer* v. *Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150, and note.

PEOPLE *v.* TURNER.

[117 NEW YORK, 227.]

CONSTITUTIONAL LAW. — POWER OF THE LEGISLATURE TO ALTER THE RULES OF EVIDENCE as they existed at common law, and to limit, change, and vary existing rules for the limitation of actions, is not affected nor destroyed by the constitutional provision prohibiting the taking of life, liberty, or property without due process of law.

CONSTITUTIONAL LAW — WHO MAY URGE INVALIDITY OF A STATUTE. — No one but the owner of property is entitled to set up that it has been taken by virtue of an unconstitutional statute. This rule is the necessary result of the rule that the owner may waive the constitutional protection to his property, if he chooses.

TAXATION — NOTICE OF OPPORTUNITY TO HAVE ASSESSMENTS REVIEWED AND CORRECTED. — If a public statute designates a time when and a place where tax-payers may appear for the purpose of having assessments against them and their property reviewed and corrected, this affords to them adequate notice and an opportunity to be heard, and an assessment made under such statute is not void on the ground that it deprived the tax-payers of their property without due process of law.

CONSTITUTIONAL LAW — STATUTE MAKING A DEED CONCLUSIVE EVIDENCE OF TITLE. — A statute is constitutional which provides in regard to certain conveyances that "all conveyances that have been heretofore executed by the comptroller, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto were regular, and were regularly given, published, and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances heretofore or hereafter executed, shall be presumptive evidence of the regularity of the said proceedings, and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from date of recording such other conveyances."

Beckwith, Barnard, and Wheeler, for the appellant.

Palmer, Weed, and Kellogg, for the respondent.

RUGER, C. J. This is an appeal by defendant from an affirmance by the general term of a judgment rendered upon a verdict at circuit for the plaintiff.

The action was commenced in December, 1886, to recover the statutory penalties for cutting and carrying away trees from lot No. 219, township No. 10, in the county of Franklin, being vacant lands constituting a part of the forest preserve, and belonging to the plaintiff: Laws of 1885, c. 283, sec. 11.

The answer set up, — 1. A general denial; and 2. That the *locus in quo* belonged to the defendant.

No evidence was given on the trial that lot No. 219 ever belonged to or was occupied by the defendant, and the con-

troversy thereupon resulted in an effort on his part to defeat a recovery through the alleged weakness of the plaintiff's title. The plaintiff made title to the lot through a comptroller's deed, dated in 1881, and recorded in 1882, purporting to convey the premises in question to the plaintiff in pursuance of a tax sale of non-resident lands, had in 1877, for unpaid taxes levied previous to the year 1871, in township No. 10, Franklin County.

It is contended by the appellant that such deed was invalid and conveyed no title, because for two years previous to and at the time of the conveyance a small portion of such lands were in the possession of an actual occupant, who had not been served with notice to redeem, as required by the statute. This fact, if proved, would ordinarily have invalidated the deed given, and was therefore made a prominent issue on the trial. Much evidence was given on the subject on both sides. The evidence of such occupation related to an inconsiderable portion of the lot, and was, in itself, extremely vague, indefinite, and unsatisfactory. Its force was also much impaired by the testimony of plaintiff's witnesses. A fair question as to whether there had been any legal occupation of any part of these premises during this period was raised for the consideration of the jury upon the evidence, and we think it was properly disposed of by them: *Smith* v. *Sanger*, 4 N. Y. 577. It was also claimed by the defendant that, by reason of certain alleged irregularities on the part of the assessors in making assessments for the years 1864 and 1867 in this township, the comptroller acquired no jurisdiction to make the sale, and an offer to prove this defense was excluded by the court, upon the ground that the comptroller's deed was conclusive evidence of the regularity of the proceedings upon which it was based.

The irregularities referred to consisted of the alleged omission by the assessors to give notice of a review of the assessments in the years referred to, or to hold a meeting for such purpose, as required by sections 19 and 20 of volume 2, Revised Statutes (7th ed.), page 992, and closing and verifying the assessment prior to the time provided by statute for so doing. It is answered to this objection, in the first place, that there is no evidence in the case that the sale was based upon the taxes levied in the years referred to.

We think it was essential to the defense attempted to be established that the defendant should affirmatively show, or offer to show, that the sale was founded upon the alleged

irregular taxes. The burden of proving this fact lay upon the party alleging it, and no attempt having been made to prove it, there was no legal defense proved, or offered to be proved, by the defendant in respect to the matter referred to. Showing, or offering to show, that there were irregularities in the assessments for some of the years prior to 1871, had no tendency to show that there were not others, which were valid, upon which the sale might have been lawfully made.

A broader ground for the rejection of the evidence offered is afforded by the effect to be ascribed to a comptroller's deed, after a certain lapse of time, under chapter 448 of the Laws of 1885. That act provides, in relation to such conveyances, that "all conveyances that have been heretofore executed by the comptroller. . . . . After having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located . . . . shall, six months after this act takes effect, be conclusive evidence that the sale, and all proceedings prior thereto, ... were regular, and were regularly given, published, and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances . . . . heretofore or hereafter executed, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances." The section then further provides that "all such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid." The act, in terms, purports to preserve all existing rights of tax-payers for the period of six months after the passage of the act, and to establish a rule of evidence to govern future controversies, which made such deeds presumptive evidence of the regularity of the proceedings upon which they were based, and after two years from the recording, conclusive evidence of the same matters. With reference to the six months' provision, it operates, as to all existing cases, as a limitation upon the tax-payer's right to assert his claims under pre-existing laws, and, as to all future cases, provides

that the lapse of two years from recording shall make that which was before presumptive evidence only, conclusive upon the rights of the parties. The act seems to be, in its principal aspect, one of limitation, and, as such, is within the constitutional power of the legislature to enact as affecting future cases, and, we think, within settled rules, equally within its power as to existing rights. It gives, in all cases, a time for the person aggrieved to establish his rights unaffected by the provisions of the enactment; but provides that after the lapse of a certain time the comptroller's deed shall be conclusive evidence of the regularity of the proceedings upon which it is based. Legislation of such a character has frequently been held within the constitutional power of the legislature to enact.

The power of the legislature to change rules of evidence as they exist at common law, and to limit, change, and vary existing rules for the limitation of actions, has been the subject of frequent consideration in the courts, and has been uniformly held not to be affected or restricted by the constitutional provisions prohibiting the taking of life, liberty, or property without due process of law: *Rexford* v. *Knight*, 11 N. Y. 308; *Hand* v. *Ballou*, 12 Id. 541; *Howard* v. *Moot*, 64 Id. 262; *Terry* v. *Anderson*, 95 U. S. 628; *Mitchell* v. *Clark*, 110 Id. 633; *Hickox* v. *Tallman*, 38 Barb. 608; *Webb* v. *Den*, 17 How. 576.

It was held in *Hickox* v. *Tallman*, *supra*, that there could be no vested right in a rule of evidence, and that therefore the legislature could repeal a statute making a comptroller's deed presumptive evidence of the regularity of the proceedings upon which it was based, without affecting any constitutional right of the grantee in such deed. *Webb* v. *Den*, *supra*, held that a statute providing that deeds which had been registered twenty years or more should be presumed to be upon lawful authority, whether legally probated or not, and was constitutional, and within the authority of the legislature to make.

Considered as an act of limitation, the only question in relation thereto is, whether such limitation is just, and gives the claimant a reasonable opportunity to enforce his rights. See authorities *supra*. Under all of the circumstances of the case, it cannot, we think, be said, as a question of law, that the time afforded is unreasonable. Considered as establishing a rule of evidence, the only question for examination is, whether property is thereby necessarily taken without due process of law.

It is not contended by the defendant but that if this statute be given its natural meaning and effect, the comptroller's deed vests a valid title to the land in the plaintiff; but it is claimed that the statute is unconstitutional and void, as violating that provision of the constitution which prohibits the taking of "life, liberty, or property without due process of law," and it is urged that the exercise of the power of taxation cannot lawfully be employed without giving the tax-payer, at some stage of the proceedings, a right to be heard in relation to the imposition of taxes upon his property.

Conceding, for the purpose of the argument, the correctness of this proposition (*Stuart* v. *Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Spencer* v. *Merchant*, 100 N. Y. 585; 125 U. S. 356), it is a matter of grave doubt whether a stranger, not being in possession of or claiming title to the property taken, can raise the question that it has been illegally taken from another. The owner may waive the constitutional protection to his property if he chooses, and in that event, it is clear that no one is entitled to set it up for him: *Voss* v. *Crockcroft*, 44 N. Y. 415; *Detmold* v. *Drake*, 46 Id. 318; *Connors* v. *People*, 50 Id. 240; *Houston* v. *Wheeler*, 52 Id. 641. A stranger cannot be a person aggrieved in such a case, and comes within the general rule of law that only those having a legal interest in the subject of an action can litigate the validity of the title thereto in legal proceedings.

Passing this question, however, and assuming that the defendant had a right to rebut the plaintiff's proof of title, we come to the question, whether the owner of the property, if any such there be, has, in this instance, been deprived of his property without due process of law, and an opportunity of being heard. It may be conceded that, in the absence of a curative act, an omission by the assessors to hold meetings for the review of their assessments, and to give notice therefor, as required by statute, is a jurisdictional defect which, in a proceeding between the owner and any one claiming a right in such property under a tax sale, renders such sale irregular and void: *Jewell* v. *Van Steenburgh*, 58 N. Y. 86; *Van Rensselaer* v. *Witbeck*, 7 Id. 517; *Westfall* v. *Preston*, 49 Id. 349; *Wheeler* v. *Mills*, 40 Barb. 644. But this principle does not determine the question here presented. The question in hand concerns the power of the legislature to enact rules of evidence and limitation having retrospective effect with respect to causes of action which have not yet been made the subject of

legal proceedings, or challenged by any one having an interest in the property to be affected thereby.

No question is raised over the power of the legislature in relation to general legislation to enact laws and give them retroactive operation, so that the circumstance that they are retroactive alone constitutes no legal objection to their validity: *Dash* v. *Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291; *Norris* v. *Beyea*, 13 N. Y. 273. The argument is, that a lawful exercise of the taxing power by the legislature requires that notice and an opportunity to be heard before the taxing officers in respect to the imposition of the tax should be afforded to the tax-payer; and the stress of the contention is, that the land-owner has, by the operation of this law, been deprived of his day in court. Unless, therefore, it can be shown that the tax-payer has been actually or substantially deprived of his opportunity to be heard on the imposition of this tax, the argument fails.

It was said by Judge Allen in *Howard* v. *Moot*, 64 N. Y. 268, that "while the legislature cannot take from parties vested rights without compensation, the remedies by which rights are to be enforced or defended are within the absolute control of that branch of the government. The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to modification and control by the legislature. The changes which are enacted, from time to time, may be made applicable to existing causes of action, as the laws thus changed would only prescribe the rules for future controversies. It may be conceded, for all of the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights": *Hand* v. *Ballou*, 12 N. Y. 541. The converse of the latter proposition would seem necessarily to follow from the rule laid down, and if such legislation did not work a confiscation of property or a destruction of vested rights, it would be sustained as a legitimate exercise of power.

In *Matter of Van Antwerp*, 56 N. Y. 265, it was held that the constitutional provision that a citizen should not be deprived of life, liberty, or property without due process of law was not affected by the exercise of the taxing power. It was said "the act [in question] was an exercise of the taxing power by the legislature, which, for public purposes, is un-

limited, except as specifically restrained by the constitution. . . . . All property is held subject to such burdens as may be imposed upon it for public purposes, and the imposition does not deprive the citizen of any rights of property, within the meaning of the clauses referred to."

So, also, in *Episcopal Public School* v. *Davis*, 31 N. Y. 584, Judge Denio says that, "in executing the taxing power, the legislature provides such agencies and safeguards against surprise, mistake, and injustice as is thought expedient. It is manifestly proper that the tax-payers should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board or officer; and this is generally secured in all well-considered systems of taxation. But it is for the legislature to determine and prescribe in every case what shall be sufficient, and there is not, that I am aware of, any constitutional provision bearing on the subject." In the case of *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, this court laid down the rule, in a case involving the right of taxation to pay for the expense of a local improvement, that the constitutional prohibition against taking life, liberty, or property required that some notice should be given to the land-owner, and some opportunity afforded him to be heard in regard thereto. But it was further said in that case, that "the legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice": *Spencer* v. *Merchant*, 125 U. S. 356.

A manifest difference exists between the modes of making assessments for local improvements and those providing for annual taxation, and much reason exists why a more formal notice should be given in one case than the other. In one case they are special, transitory, and occasional; and in the other, regular, fixed, and of annual occurrence, known to all people. In one case, they become public only when proceedings are instituted, and may escape the notice of the land-owners. In the other, they occur every year, and are as constant in their recurrence as the changes of the seasons. Conceding, therefore, the right of the tax-payers to this opportunity, we think an examination of the statute under which this tax was levied shows that he was not deprived of such notice and opportunity to be heard as the nature of the case required. The provisions of the general statutes require that assessment rolls in each year shall be completed on or before

the first day of August, and notices posted in the town that a copy thereof has been made and left with one of the assessors, where any person interested can see and examine the same until the third Tuesday of August thereafter, and that on that day the assessors will meet at a time and place specified in such notice to review their assessments: 2 R. S., 7th ed., 992, 993. The notice required by this act, it will be observed, is not personal, or of an absolute character, but is constructive, and the provision for a hearing of the tax-payers by the assessors is of the most informal and indefinite character. It doubtless gives the tax-payer the right to appear before the assessors at the time stated, and endeavor to persuade them to modify or abate his assessment. He may attempt to swear off his assessment for personal property; but beyond this, a hearing does not seem to give him any legal rights, or a denial of such hearing inflict any absolute legal damage. Section 5, chapter 176, of the Laws of 1851, provides that, in case of the neglect of the assessors to meet for review, as required by the statute, any person aggrieved by an assessment may appeal to the board of supervisors at their next annual meeting, who shall have power to review and correct such assessment. The consequences of an omission by the assessors to hold the meeting are thus expressly declared, and would seem to deprive such omission of any other effect than that given to it by this statute. Ample opportunity is thereby given the tax-payer, if he feels aggrieved in respect to assessments of his property, to be heard before the board of supervisors, who are vested with full power to afford all and any relief which was possessed by the assessors. The tax-payer must be presumed to have knowledge of the provisions of public statutes; and as the time and place for the meetings of the boards of supervisors are fixed by statute, and occur at stated periods, we must presume that the legislature intended such notice of the time and place for the hearing of dissatisfied tax-payers to be adequate notice of the opportunity to be heard.

As the primary object of the constitutional provision is to enable the property owner to be heard by some officer or tribunal in respect to the taxing of his property having power to relieve him before he can be deprived of it, he cannot justly claim that he has been unlawfully assessed and taxed, if such opportunity has been offered him, and he has negligently omitted to avail himself of it. It must be assumed that the tax-payers know the law of the state in respect to the time and

method of assessing property and levying taxes; and if they are presumed to know the provisions for the review of assessments, they must be equally presumed to know the remedy given by the law for an omission by the assessors to hold the meeting for such review.

We are therefore of the opinion that the opportunity afforded the tax-payer to appear before the board of supervisors, and challenge the legality and fairness of his assessment, was a satisfaction of his rights in respect to a hearing on the subject. It would have been competent for the legislature, while authorizing the imposition of taxes, to have omitted altogether the provisions requiring notice and a meeting by the assessors to review assessments, and to have provided only for a hearing before the supervisors in the first instance. Having full authority over the subject, it could lawfully provide for the way and manner of hearing the tax-payer, and in default of a hearing as provided, it could declare the consequences of such default, and provide for a hearing in some equivalent mode. So long as the tax-payer is given the equivalent, therefore, the legislature has done all that is required of it under any view of the tax-payer's constitutional rights: *Spencer* v. *Merchant*, 100 N. Y. 585. It was held in *Matter of De Peyster*, 80 Id. 565, that an assessment for the expenses of building a sewer is not invalid because of omission to give to the owners of lots assessed a personal notice that an assessment is to be imposed. The legislature may prescribe what the notice shall be; and when provision has been made for notice by publication before the final confirmation of the assessment, and an opportunity afforded to make objections within a time specified, and this has been complied with, no constitutional right of the tax-payer has been violated by such proceeding.

This case seems to be an authority for the views above presented. But more than this, after the tax has been returned to the comptroller, the tax-payer has still the right, both before and after the sale of his property, to appear before that officer and make proof of any illegality in the tax levy, and demand that such tax, and any sale made thereon, shall be canceled by him: Laws 1855, secs. 83, 85, c. 427; 2 R. S., 7th ed., 1032. And finally, the act of 1885 itself provides for the exercise of the right of the comptroller to cancel taxes and sales illegally made, where the taxes have been legally paid, or where the town or ward had no legal right to assess the land. These rights were not only open to the tax-payer to

exercise at any time previous to the act of 1885, but the right of all persons to exercise them was also preserved in all cases for six months after the passage of that act. Any damage that may occur to the citizen by reason of a change in the statutory limitations befalls him in consequence of his neglect to avail himself of the remedies which the law leaves open to him for a prescribed period, and not by reason of the operation of the law itself. It would seem that the right of a property owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law.

Any error in the admission by the trial court of the answer to the question, "Who did they say they measured for?" put to the defendant's employees, was cured by the subsequent admission of the defendant that the witnesses were in his employ.

The writings offered in evidence by the defendant, purporting to be unauthenticated copies of papers in the comptroller's office, were properly rejected by the court. No legal proof that they were such copies was given, and the case does not show that they were in any way material.

The assessment rolls of the township from 1872 to 1883, offered in evidence by the defendant to show that lot No. 219 was assessed to one Smith as resident lands, with a view of raising a presumption that they were actually occupied during that period, were properly excluded by the court. The question at issue was, whether the lands were actually occupied or not, and the proposed evidence had no tendency to prove this fact; for if Smith was a resident, the lands would have been assessed to him, whether occupied or not. In any view, the evidence simply tended to show that the assessors supposed the land was occupied, and that fact was clearly incompetent upon the issue of actual occupation.

It follows, from the views expressed, that the judgment should be affirmed.

STATUTES, WHO MAY ATTACK FOR UNCONSTITUTIONALITY — The constitutionality of a statute cannot be called in question by the people; individuals only can raise the question: *People* v. *Rensselaer etc. R. R. Co.*, 15 Wend. 113; 30 Am. Dec. 33; nor can individuals attack a statute, unless it affects their individual rights: *Sullivan* v. *Berry*, 83 Ky. 198; 4 Am. St. Rep. 147; *County Commissioners* v. *State*, 24 Fla. 55; 12 Am. St. Rep. 183; *Wellington et al., Petitioners*, 16 Pick. 87; 26 Am. Dec. 631.

CONSTITUTIONAL LAW. — As to the power of the legislature to pass acts which shall correct and supply deficiencies in proceedings under the laws of taxation: Extended note to *People* v. *Seymour*, 76 Am. Dec. 527–537.

AS TO WHAT RECITALS IN TAX DEEDS ARE EVIDENCE OF: Extended note to *Jackson* v. *Shepard*, 17 Am. Dec. 505–514, wherein the power of the legislature to make tax deeds *prima facie* evidence of the regularity of the proceedings under which such deeds were executed is discussed: *Lacey* v. *Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Long* v. *Burnett*, 13 Iowa, 28; 81 Am. Dec. 420. Under a statute making a tax deed evidence of the regularity of an assessment, evidence that the property in dispute had been assessed with other property not owned by defendants, and the value of all fixed at a gross sum, is admissible in an action to determine the title claimed under a tax deed: *Strode* v. *Washer*, 17 Or. 50. A tax deed, executed after the commencement of a suit, and not put in issue nor mentioned in the pleadings, cannot be put in evidence: *Campbell* v. *Fulmer*, 39 Kan. 409. Although a tax deed may be *prima facie* valid, records of the county court are always competent to defeat it, under the tax laws of Missouri: *Kinney* v. *Forsythe*, 96 Mo. 414; but statutory certificates of tax officers cannot be collaterally contradicted: *Tompkins* v. *Johnson*, 75 Mich. 181.

TAX DEEDS CANNOT BE DECLARED BY STATUTE to be conclusive as to matters of jurisdiction: *Maguiar* v. *Henry*, 84 Ky. 1; 4 Am. St. Rep. 182, and note 187–189, as to the power of the legislature to make tax deeds conclusive evidence, or to shut off defenses thereto.

GIFFORD *v.* CORRIGAN.

[117 NEW YORK, 257.]

AGREEMENT BY A MORTGAGEE TO ASSUME AND DISCHARGE A MORTGAGE ON THE PROPERTY CONVEYED TO HIM CANNOT BE RELEASED or annulled by the grantor after the mortgagee has elected to accept the agreement as made for his benefit, and has notified the grantee of such acceptance.

ACTION to foreclose a mortgage executed by the Father Matthew Temperance Society, and to charge the defendant Corrigan, as executor of Cardinal McCloskey, with any deficiency which might remain due under such mortgage after a foreclosure sale. John McEvoy, while the owner of the property, had conveyed it to Cardinal McCloskey, and the conveyance contained a covenant on the part of the grantee to assume and discharge the mortgage. Judgment, entered in favor of the plaintiff by the trial court, was affirmed on appeal by the general term.

Edward C. Boardman, for the appellant.

Ralph E. Prime, for the respondents.

FINCH, J. On a previous appeal we determined in this case that the record of the deed to the defendant's testator, Mc-

Closkey, by which the grantee assumed the payment of plaintiff's mortgage, was not, under the circumstances, sufficient proof of the delivery and acceptance of the deed. As the case now stands, the effect of that record is fortified by direct proof of the delivery, and strong circumstantial evidence of the acceptance. Both facts are now explicitly found by the trial court, but the appellant again denies the sufficiency of the proof.

The mortgage was executed in 1869. The land which it covered was sold and conveyed to McEvoy in 1870. McEvoy was a parish priest, and held the title until 1878, when he conveyed to McCloskey, the defendant's testator, who, in and by the deed, assumed the payment of the outstanding mortgage. Two things occurred the next year. McCloskey was informed by letter that upon the premises owned by him, describing those conveyed by McEvoy, there was a mortgage to Masterton, payment of which was requested, and a few days after, in a personal interview with the attorney acting for the mortgagee, was told of the deed and its record, and the assumption clause was read to him, and his liability under it asserted. McCloskey answered that he would communicate with Father Keogh; that he had referred the matter to him, and that the witness would hear from Keogh. The latter was the successor of McEvoy as parish priest, and owed his appointment to the cardinal. The second thing was, that the account for the rents of the property collected by Keogh were by him returned once a year to the chancery office which managed the cardinal's business affairs relating to the church. Within one year, therefore, after the record of the deed, McCloskey knew all about it, and instead of repudiating it, and refusing acceptance, simply referred the creditor to the parish priest, who began a uniform system of collecting the rents of the property, and returning the facts to the cardinal's business office, which was their proper repository. Keogh not only remained in possession under McCloskey, but insured the premises in the name of the cardinal. For some time after its record, the deed remained in the custody of McEvoy, but as early as 1882 he delivered it to O'Connor, who was a clerk in the chancery office. The superintendent of that office was Preston. He is called in the record vicar-general and chancellor and monseigneur. Whatever his ecclesiastical title, his own evidence shows that he was merely a subordinate or secretary of the cardinal, with no authority of his own, and

dependent wholly upon the directions of his superior, either general or specific. His attention was called to the deed after its delivery at the chancery office by O'Connor, who delivered it. Preston says that the next time he saw Keogh, he "positively forbade him to have anything to do with that hall, or to accept any rent for it." This is said to have occurred in 1882. It does not appear that Preston had any authority from the cardinal to issue this order to Keogh, or any general direction which covered it. It is certain that Keogh did not obey it, for he continued to collect the rents, and report them as part of his parish accounts to the chancery office. Preston was either ignorant of the current transactions which it was his duty to supervise, or he had withdrawn his command, or the parish priest was deliberately defying his superiors and they were patiently submitting to it. At all events, the deed rested in the chancery office, the priest kept possession of the property, and accounted for its rents to McCloskey; no offer of a reconveyance has been made, and the record is searched in vain for any word or act of refusal or repudiation by McCloskey. On such a state of facts, the finding of the special term that there was a delivery and acceptance may easily stand, and must conclude us on this appeal.

But another circumstance introduces an additional defense, and raises a further question. Just after the issue of a summons in this action and the filing of a *lis pendens*, the executor of McEvoy formally released McCloskey from his covenant, and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then, in further consideration of one dollar, formally releases the cardinal from his covenant. This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for foreclosure by the issue of a summons, and filing of a *lis pendens*, at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defense to this action? I shall not undertake to decide, if, indeed, the question is open (*Knickerbocker Life Ins. Co.* v. *Nelson*, 78 N. Y. 137; *Comley* v. *Dazian*, 114 Id. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course, it is difficult, if not impossible, to reason about it without recurring to *Lawrence* v. *Fox*, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and therefore he might sue upon it, although privy neither to the contract or its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he may sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not obtained earlier, it must have vested in him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reli-

ance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of *Lawrence* v. *Fox*, 20 N. Y. 268, stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant, as agent of the mortgagee who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized, it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee, through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor. In *Burr* v. *Beers*, 24 N. Y. 179, 80 Am. Dec. 327, and again in *Garnsey* v. *Rogers*, 47 N. Y. 242, 7 Am. Rep. 440, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before *Lawrence* v. *Fox*, 20 N. Y. 268, made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might, in equity, be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant, and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in *Halsey* v. *Reed*, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well so long as there was supposed to be no equivalent remedy at law, but after the decision

of *Lawrence* v. *Fox*, *supra*, that remedy existed. And so in *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so I think the suggestion is well founded. But if I am wrong about that, as, perhaps, I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise, and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it, and notifies the other party of his intention to rely upon it. As a right founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced, for the permission reads, "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or, at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion, respecting the basis of these rights of action which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received is a familiar illustration. May we not deem this another? If we do, and the door is thus opened wide to equitable considerations, I am quite sure it will follow that while no right of the

mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet, to permit a change thereafter, while the creditor is relying upon it, would be grossly inequitable, and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result, that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed, with costs.

ASSUMPTION OF A PRIOR MORTGAGE BY A GRANTEE. — As to the rights and remedies of the parties to a mortgage, which has been assumed by a grantee of the premises, see extended and exhaustive note to *Klapworth* v. *Dressler*, 78 Am. Dec. 72–90, wherein all the various phases of this subject are discussed; compare also *Meech* v. *Ensign*, 49 Conn. 191; 44 Am. Rep. 225, and note 232, 233; *Fiske* v. *Tolman*, 124 Mass. 254; 26 Am. Rep. 659, and note 660–667. In *De Costa* v. *Comfort*, 80 Cal. 507, it is held that a vendee of a mortgagor, who agrees to sell the premises and pay the mortgage debt from the proceeds of the sale, is liable to the mortgagee upon his promise. But in *Clapp* v. *Halliday*, 48 Ark. 258, a mortgagee, who accepted a mortgage reciting a prior mortgage, though estopped from denying the existence of such prior mortgage, was held not to have assumed payment thereof, further than the value of the mortgaged property which he received. And in *Chadwick* v. *Island Beach Co.*, 43 N. J. Eq. 616, the grantee of a mortgagor, who takes his conveyance subject to such mortgage, cannot retain possession against a purchaser at a foreclosure sale under the mortgage.

DEED BY MORTGAGOR TO THIRD PARTY. — Whenever property is transferred, no matter in what manner, if in reality as security for a mortgage debt, the transfer is a mortgage, and the relation of mortgagor and mortgagee will exist; so held where a mortgagor conveyed the legal title to a third party as trustee: *Marshall* v. *Thompson*, 39 Minn. 138.

AGREEMENT BETWEEN FIRST MORTGAGEE and a subsequent purchaser of part of the premises can be made, whereby the purchaser is to take title under the foreclosure sale of the whole tract, exclusive of any other subsequent liens, even though such purchaser assumed by the recitals in his deed of conveyance all encumbrances upon the land: *Santa Marina* v. *Connolly*, 79 Cal. 517.

National Butchers' and Drovers' Bank v. Hubbell.

[117 New York, 384.]

Indorsement, for Collection, of a draft or check is not a transfer of the title to the indorsee, but merely constitutes him the agent of the indorser to present the paper, demand and receive payment, and remit the proceeds. Nor does a different result follow from the fact that the indorser is credited, and the indorsee charged, with the amount of such draft or check, where it appears that the indorsee does not become unconditionally responsible for such amount until the draft or check is actually paid.

Assignment by a Bank for Benefit of Creditors. — Where a Bank, to Which Drafts or Checks have been Sent for collection, makes a general assignment for the benefit of its creditors, its assignee does not acquire any title to such paper; and if the collections made thereon by collecting agents are paid to him, he is answerable for the amounts thereof to the owners of such drafts and checks, and is not relieved from liability by the fact that he paid out such moneys in good faith, and as authorized by the court having jurisdiction over him as such assignee.

Where Drafts and Checks are Indorsed to a Bank for Collection, and the course of business is for the collecting bank to remit but once a week, it is under no obligation to remit the identical moneys collected, and if it pays them out in the usual course of business, it becomes the debtor of the bank which sent such drafts or checks, and the position of the latter is not different from that of an ordinary creditor.

Assignee for the Benefit of Creditors can Acquire No Better Title to a Draft or Check Indorsed to his Assignor for Collection than the latter had; and if he disposes of or pays out paper or money, though in good faith, and not under order of court, to which his assignor had no title, he is answerable to the owner thereof.

Assignee for the Benefit of Creditors is not Entitled to Demand, before an action can be sustained against him for moneys or property, the legal title to which was never in his assignor.

Order of Court that an Assignee for the Benefit of Creditors Pay a Certain Dividend cannot protect the assignee in paying out moneys to which his assignor had no title.

Laches. — The Owner of a Draft or Check Indorsed for Collection to a Bank, which subsequently makes an assignment for the benefit of its creditors, is not guilty of laches because he delays for sixteen days after having notice of the assignment to demand of the assignee the proceeds of such drafts or checks by him received.

Action against Alfred Wilkinson and J. Foreman Wilkinson, partners, composing the firm of Wilkinson & Co., and Charles E. Hubbell, assignee of such firm, for moneys collected on checks, notes, and drafts forwarded by plaintiff to said firm for collection. The plaintiff was a banking corporation doing business in the city of New York. For many years before December, 1884, the defendants, Wilkinson and Wilkinson, were doing business as private bankers at Syracuse.

Plaintiff was accustomed to forward to them for collection checks, drafts, and notes made payable at different places at the said city of Syracuse and vicinity. The course of business between the two banks was as follows: The plaintiff, on receiving checks, drafts, or notes payable at Syracuse or vicinity, indorsed them as follows: —

"Pay Wilkinson & Co., or order, for collection for account of National Butchers' and Drovers' Bank of the city of New York. W. H. CHASE, Cashier."

Such drafts, checks, and notes were then addressed in a letter to the firm of Wilkinson & Co. in the following form: —

"NATIONAL BUTCHERS' AND DROVERS' BANK.

"NEW YORK, 188–.

"MESSRS. WILKINSON & Co.

"*Dear Sirs*, — Your favor of the —— inst. is received with inclosure, as stated. I inclose for collection credit bills as stated below. Respectfully yours,

"WILLIAM H. CHASE, Cashier."

To this letter was appended an itemized statement of checks, drafts, etc., naming the place where payable, the amount of the checks, etc. The plaintiff, upon its books, charged Wilkinson & Co. with amount of the various checks and drafts forwarded to them, and credited them for any moneys which were remitted to or received by plaintiff from them. Wilkinson & Co., on receipt of the checks and drafts, credited the plaintiff with such of them as were payable on demand, at their face value, but those which were not payable on demand were not credited to plaintiff until paid. If any paper was protested, it was charged back on the books of Wilkinson & Co. to plaintiff, and returned to it. If the paper received by Wilkinson & Co. was payable at banks not doing business at Syracuse, it was forwarded by them to their correspondents at the cities or villages where payable to be collected, and the proceeds returned to Wilkinson & Co. On Thursday of each week they remitted to plaintiff by draft the amount then standing to plaintiff's credit, less the charges for their services. Plaintiff, on December 8, 1884, and for a number of days before that date, forwarded to Wilkinson & Co. various drafts, checks, and notes, amounting to $14,260.36, all of which, excepting time collections, aggregating $438.60, were credited to plaintiff. Of the paper thus received by Wilkinson & Co., they, before December 9, 1884, had sent various sums to other

agents for collection, leaving a balance to be accounted for of $13,822.43. Of this latter sum $9,195.50 was received by Wilkinson & Co. from December 4th to December 9th, both days inclusive, and had been paid out by them in the due course of their business. They executed, on the 9th of December, 1884, to Charles E. Hubbell, a general assignment for the benefit of their creditors, and he accepted the trust, and qualified as assignee. After his appointment, he received of the checks, drafts, etc., sent by plaintiff to his assignor, the sum of $4,626.83. Of this latter sum, $438.67, being the proceeds of time paper, were remitted to the plaintiff; but the balance, being $4,188.16, the assignee refused to pay to plaintiff. Receiving no notice of plaintiff's claim, defendant Hubbell had, as assignee, received the sum of $10,903.36, and had paid out in the management of the estate, and in a dividend to the preferred creditors, the sum of $10,548.57. The dividend thus paid was paid in accordance with the provisions of the assignment and under an order of the judge of the county court, and all payments made by Hubbell were in good faith, and without any notice or knowledge of the claims made by the plaintiff. After the assignee had paid out the money, and on the 26th of December, 1888, the plaintiff served a notice upon him of its claim to the proceeds of the moneys, drafts, checks, and securities received by Wilkinson & Co. from the plaintiff. The trial judge decided that Wilkinson & Co. were liable for the amount collected by them as proceeds of the papers sent to them by plaintiff, but that defendant Hubbell was not answerable, either for the moneys received and spent by Wilkinson & Co., nor for the moneys received by him, and paid out by him under the assignment.

William Jones, for the appellants.

Louis Marshall, for the respondents.

Peckham, J. The defendant Hubbell, as one defense to the claim of the plaintiff, insists that Wilkinson & Co., upon the receipt by them of the various checks and drafts or other pieces of paper payable on demand, and upon the crediting of the amounts thereof to the plaintiff upon their books, without waiting for the payment of the same, became the owners thereof, and that these facts amounted to a transfer of the title to the paper, or its proceeds, to Wilkinson & Co. In that, we think he is mistaken. The indorsement upon each piece of paper was for collection simply, and by virtue of that indorse-

ment no title passed to the firm, but on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof, and remit to it. Under such circumstances, the title to the paper remained in the party sending it: *Montgomery Co. Bank* v. *Albany City Bank*, 7 N. Y. 459; *Dickerson* v. *Wason*, 47 Id. 439; 7 Am. Rep. 455; *White* v. *National Bank*, 102 U. S. 658.

The letter accompanying the inclosures of paper amounted simply to a direction to credit after the collection was made; and up to the time that the funds were actually received by the firm, it certainly would make no alteration in the law relative to indorsement for collection only.

Nor does the finding of the learned justice at special term, as to the custom pursued between the parties, alter the law in regard to the title to the paper before the funds arising from the payment thereof were actually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of book-keeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received; because, if any were not paid, such as went to protest were at once charged back upon the books of the firm against the plaintiff, and returned to it, with the expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the amount of these collections until the collections were actually made, and the proceeds received by them.

The property in these different pieces of paper, therefore, never vested in the firm, and the firm never purchased them or advanced any money upon them. Hence the firm never owned them: *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Dickerson* v. *Wason*, *supra*.

These pieces of paper were undoubtedly subject to the direction of the plaintiff at any time prior to their payment, and it would have been the duty of the firm to have obeyed such direction. The plaintiff could have withdrawn the paper, or made such other disposition of it as seemed to it proper. It might have been liable to pay the firm for the services performed by them, but that had no effect or bearing upon the title to the paper.

The cases relied on by the counsel for the defendant for the purpose of showing title in the firm were decided upon an essentially different state of facts. In *Clark* v. *Merchants' Bank*, 2 N. Y. 380, the indorsement was in blank, which the

court said, *prima facie*, imported a transfer of the title to the note, and that it was not sent for collection merely. Upon looking at the other facts in the case, the court held there was nothing to show that the paper was sent for collection only, but on the contrary, it appeared plainly that it was intended to pass the title. Gardner, J., in that case, said: "The whole fund was, by the course of dealing, and, in this instance, by the directions of the plaintiff, treated as cash. It was passed to their credit according to their instructions, and the draft in question was for account." Again, he said: "The whole arrangement was one of mutual convenience, and to hold that such drafts were transmitted for collection merely, with no right to a credit, or to draw against them until they were actually paid, is to lose sight of the situation of these brokers, their business, and their necessities."

In *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530, the bank received the check from the depositor as a deposit of money, and entered the amount as cash to the credit of the depositor in his bank pass-book, which was returned to him. It was held that the title to the check passed to the bank. It was not received merely for collection. The court, per Danforth, J., said: "It is not disputed that Murray [the depositor] held the check as owner. It was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection. Others he deposited, and took credit therefor as cash upon his pass-book. As to the first, he could give and revoke his own directions as often as he chose, but as to the others, when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control." There, again, the credit was of so much cash. It was nothing less than the purchase of the check. The indorsement was in blank, and the bank took it as owner.

In *Briggs* v. *Cent. Nat. Bank of New York*, 89 N. Y. 182, 42 Am. Rep. 285, the defendant made the First National Bank of Newark its collecting agent. The bank upon which the check was drawn, upon its receipt, charged the check to the drawer, and credited the defendant with the amount in its account. By the transaction the check was paid to the Newark bank, and it was only necessary for it to remit its collections once a week to the bank in New York under its agreement. The next day, however, it suspended payment, and in an action by the person who gave the check to the defendant for collection, it was held that the defendant was liable for the

payment thereof, although it had not received the amount from its own agent in Newark. The case is not in the least similar to the one at bar.

In *People* v. *City Bank of Rochester*, 93 N. Y. 582, that bank and the Utica City National Bank each acted as agent for and kept a running account with the other, the balance being struck once a week, and the bank found indebted remitting the balance due. The crediting of the paper was entirely different, and there was a mutual account current between the banks. All that case holds, however, is, that when the moneys were paid the relation between the banks was simply that of debtor and creditor.

We cannot see, therefore, that, as to the paper not actually collected and the cash received by Wilkinson & Co., before their failure, it ever became the property of that firm, or that the title to the proceeds thereof ever vested in that firm or its assignee.

As to the moneys received by the firm in payment of checks and drafts sent to it for collection by the plaintiff and by the firm, paid out before the assignment, and in the usual course of business, in payment of the debts of the firm, and, of course, never received by the assignee, we do not see that the plaintiff occupies any different position in that regard towards the firm than any other creditor. As the firm was to remit but once a week, of course it was not expected that the identical moneys received by it, in payment of paper sent to it for collection, were to be sent to the plaintiff. The firm, by the arrangement, had the right to retain the moneys and to remit weekly, and, of course, from one week to another it had the right to use the money, and the plaintiff relied upon the credit of the firm for such time as it had the right to retain the money.

But it is claimed, on the part of the defendant, assignee, that, assuming that no title to the checks passed to Wilkinson & Co., the plaintiff is not entitled to recover, so far as regards the proceeds of the paper that were received by the assignee, and expended by him in good faith and without notice by him of any claim on the part of the plaintiff prior to the making of the demand or the service of the notice by the plaintiff upon him. We think this claim cannot be maintained.

In the first place, the money received by the assignee as proceeds of the paper sent by the plaintiff to the firm for collection, and not collected by the firm before the assignment, never became the property of that firm, and therefore the

legal title never passed to the assignee of the firm. It was not transferred by the firm to the assignee, because, at the time when the assignment was made, the money had not been collected, and had not come into the hands of the assignors. It never came into the hands of the assignee by virtue of the assignment, in any legal sense of the term. The moneys came to him from the various collecting agents to whom the drafts and checks had been sent by the firm. The assignee could get no better title to the moneys than his assignor, and neither had any right to apply such moneys collected, after the failure, to the payment of firm debts. If it be said that he received and applied them in good faith, it may be answered that good faith did not change the title of the plaintiff to the proceeds of its property.

There are cases in which an assignee or trustee is protected for acts done in good faith under an instrument creating the trust, and before such instrument has been declared invalid. Where an assignee under an assignment for the benefit of creditors, fraudulent upon its face, pays money to *bona fide* creditors of the assignor, in accordance with the directions of the assignment, he will be protected, provided he does it in good faith, and before any other creditor has obtained a lien upon the money. This is because the assignment, as between the parties to it, is valid, and the assignee, in making such payment, is doing no more than the assignor might at that time lawfully have done if no assignment had been made. In such case, all that can be said is, if the assignment be declared void, that the assignor paid certain of his creditors indirectly, and through the agency of the assignee, at a time when he had the right to do it directly but for the assignment. Such was the case of *Ames* v. *Blunt*, 5 Paige, 13, where the chancellor said that the liability of the assignee depended upon the question whether the rights of the plaintiff had been affected by the distribution of the proceeds of the assigned property to *bona fide* creditors of the assignor. And it was held that the plaintiff was not thereby injured, because the assignee had done no more than the assignor might have done at any time before the plaintiff obtained a lien upon the money paid by the assignee. To the same effect are the cases of *Collumb* v. *Read*, 24 N. Y. 505; *Averill* v. *Loucks*, 6 Barb. 470, 477; *Iddings* v. *Bruen*, 4 Sand. Ch. 417.

The case of *Sullivan* v. *Miller*, 106 N. Y. 635, is also an instance of the same general principle. In that case, the prop-

erty belonged to the assignor, and was assigned to the assignee subject to a mortgage. The action of the assignee (or his successor, the receiver) was upheld by the court. The title to the property was in the assignor. It was not property of a third person which he disposed of.

It is argued, also, that as this property came honestly into the possession of the assignee, the plaintiff would have to prove a demand upon and a refusal by him to give it up before an action could be maintained; and it is then claimed that where such an assignee, before notice has been given to him, or any demand made upon him for a surrender of the property, has disposed of the same in good faith, he is relieved from liability. The cases cited by counsel are those where property has come into the hands of the assignor tortiously, and under such circumstances that, as between him and the original owner, the latter could insist upon his title. In such case, where possession of the property is given to the assignee under the assignment, it is held that, as he innocently came into the possession of the same, before an action can be maintained against him demand must be made for the surrender of the property. Such is the case of property obtained by the assignor by fraudulent representations, where the vendor has the right to rescind the contract and take back the property: *Barnard* v. *Campbell*, 58 N. Y. 73; 17 Am. Rep. 208; *Goodwin* v. *Wertheimer*, 99 N. Y. 149. But in such case, the legal title is in the assignor at the time he makes the assignment, and that title passing to the assignee, who is innocent of the fraud, a demand by the vendor must be made before an action for its recovery can be maintained.

The case of *Haggerty* v. *Palmer*, 6 Johns. Ch. 437, is of a similar nature. The legal title to the property was in the assignor, and the assignee took it. If disposed of by him to a *bona fide* purchaser for value without notice, the vendee might be protected, and the assignee also, if he sold before he himself had any notice. Here the property was never the property of the assignor. It never came to the assignee by virtue of the assignment, in any legal acceptation of that term. Indeed, he must have known that the property did not belong to the assignors. At least, an inspection of their books would have shown, as it seems to us, enough to put him upon inquiry as to where the title to these moneys vested. It did not vest with the assignors, and they could transfer none to their assignee.

Again, we do not think that the order of the county court or the county judge for the payment of the dividend was the least protection to the assignee. That order did not assume to say what moneys should be used in the payment of the dividend. It did not assume to decide whether these moneys were the moneys of the assignor. That question was not before the court. It simply gave directions to the assignee to pay a certain dividend upon papers which, it is to be presumed, showed to the court or judge that the assignee claimed to have moneys enough of the assignor in his hands at the time to pay it with.

But even if it had assumed to direct that these particular moneys should be paid, we see no protection thereby given to the assignee. The plaintiffs could not be concluded upon a question as to the title to their property by any *ex parte* decision of the county judge. The case of *Herring* v. *New York etc. R. R. Co.*, 105 N. Y. 375, has nothing to do with the point. The plaintiff here was no lienor of property in the possession of the assignee. It was, as we have seen, the absolute owner of it, and it could not be divested of its title without some notice.

Lastly, the claim is made that the plaintiff has been guilty of laches in asserting its rights, and that therefore the payment made by the assignee in ignorance of the existence of its claim is to be protected.

If laches were a defense, we see no facts upon which their existence can be founded. The plaintiff heard of the assignment of Wilkinson & Co., at the earliest, not before December 10, 1884, and on the 26th the demand on its behalf for these moneys was made of the assignee. It seems that, under an *ex parte* order of the county court or judge made on the 23d of December, he had already paid out a large part of this money. It would be a pretty stern application of the doctrine of laches to hold that a plaintiff should be deprived of all title to its property by reason of not making a demand for it of an assignee of a third person for the benefit of creditors within less than sixteen days after it heard of the assignment, and where it had no reason to suppose that the assignee would take its property to pay the debts of the assignors. The defense of laches is not made out.

Whether the funds (if there are any) in the hands of the assignee, collected by him since the service of the notice and the demand, should be impressed with a trust to reimburse the

plaintiff the amount of its property used to pay the debts of the assignors, we do not now decide. We should want more facts before us. We should, among other things, want to know whether any liens had been acquired by any other creditor upon such moneys, and under what circumstances, so as to be able to decide understandingly as between different claimants to such funds. Perhaps other parties would have to be brought in.

Upon the whole, we think the assignee is liable to account to the plaintiff for the moneys received by him subsequent to the ninth day of December, 1884, being the proceeds of the checks or drafts above referred to.

It results from these views that the judgment of the general and special terms should be reversed as to the assignee, and a new trial granted against him, with costs to abide the event.

NEGOTIABLE INSTRUMENTS — INDORSEMENT FOR COLLECTION. — The indorsement of a note for collection passes such title to the indorsee as will give him the right to sue in his own name, although he paid nothing for the note: *Roberts* v. *Parrish*, 17 Or. 583; but money received by an indorsee for collection is held by him in trust for the indorser: *Blaine* v. *Bourne*, 11 R. I. 119; 23 Am. Rep. 429; compare *Bartlett* v. *Isbell*, 31 Conn. 296; 83 Am. Dec. 146.

ASSIGNEE FOR THE BENEFIT OF CREDITORS takes only the rights of his assignor, and is affected with claims, liens, and equities enforceable against the debtor: *Brown* v. *Brabb*, 67 Mich. 17; 11 Am. St. Rep. 549; so that property which does not belong to the debtor does not pass to his assignee for the benefit of creditors: *Millhiser* v. *Erdman*, 98 N. C. 292; 2 Am. St. Rep. 334; *Audenried* v. *Betteley*, 5 Allen, 383; 81 Am. Dec. 755.

HENDRICKS *v.* ISAACS.

[117 NEW YORK, 411.]

HUSBAND AND WIFE CANNOT CONTRACT WITH EACH OTHER by the common law nor under the statute of New York.

IF HUSBAND AND WIFE CONTRACT WITH EACH OTHER AS IF UNMARRIED, A COURT OF EQUITY INQUIRES whether the contract was fair and just, and equitably ought to be enforced, and administers relief where both the contract and circumstances require it.

HUSBAND AND WIFE. — COURTS OF EQUITY DO NOT ENTERTAIN JURISDICTION TO ENFORCE MERE VOLUNTARY AGREEMENTS not founded upon any valuable consideration, either in favor of the wife against the husband, or in his favor against the wife; but if they are fair and just, and have been consummated, a court of equity will uphold the transaction, except as against creditors.

HUSBAND AND WIFE. — CONTRACT BY A WIFE TO REPAY MONEYS WHICH THE HUSBAND ADVANCES TO DEFRAY the expenses of herself and their children will be enforced in equity, if the husband had already paid her a gross sum for expenses to be applied in her discretion, and she was also in receipt of an income from a bequest made by her husband's father, which the latter directed her to apply to the maintenance of herself and her issue. But her agreement to repay her husband will not be enforced against her administrator, if it is shown that in her lifetime she expended, in the support of herself and their children, the entire income which she had received under the will, and that the debts owing by her exceeded the amount collected by her administrator for arrears of income due her under her will at the time of her death.

CLAIM made by plaintiff against the administrator of the estate of his deceased wife, Justina B. Hendricks. The claim was referred to a referee, who found the following facts: M. M. Hendricks, father of the plaintiff, dying in May, 1884, left a will, which was afterwards admitted to probate, and which provided for the payment to plaintiff's wife of certain portions of the rents, issues, and income of his estate, and which also declared, "it is also my will that whatever moneys may be received by said Justina B. Hendricks under this clause are to be applied to the maintenance and support of herself and the issue by her present husband." In May, 1884, the plaintiff made an advance nominally to his daughter Rowena, but which was really intended for the use of the mother, and the daughter then executed and gave to the father the following receipt:—

"LONG BRANCH, May 26, 1888.

"Received from father an advance of two hundred dollars, to be repaid him from the interest due mother when received by her, arising out of the estate of M. M. Hendricks, deceased." To the bottom of this receipt was appended a statement signed by Justina B. Hendricks, as follows: "I concur and agree to this." Afterwards, five other advances were made by plaintiff to his daughter Rowena under like circumstances, and for each she executed a receipt in the same form as that given above, and having the like approval and concurrence of Mrs. Hendricks. Mrs. Justina B. Hendricks died intestate July 18, 1885, having prior to her death received, under the provisions of M. M. Hendricks's will, three thousand dollars. After the death of Mrs. Hendricks, her administrator received the further sum of $2,743.18 for arrears of income due under the will of M. M. Hendricks at the time of her death. Judgment was entered in favor of the plaintiff.

William Man, for the appellant.

Abram Kling, for the respondent.

ANDREWS, J. The advances made by the plaintiff to his wife in the summer of 1884 were made for the support of the family, and upon her written promise to reimburse the plaintiff from the interest, when received by her, "out of the estate of M. M. Hendricks, deceased." This was the clear legal import of the writing, interpreted in connection with the circumstances. The money advanced, though received by the daughter, was received for the mother. The daughter entered into no engagement for its repayment. The receipts acknowledged the receipt of the sums advanced, and that they were to be repaid by the mother out of the fund specified. They were signed by the daughter, but the mother undersigned them, and her signature was preceded by the words, "I concur and agree to this." The mother thereby entered into an original obligation to repay the advances. It was her promise, and not a promise of the daughter guaranteed by her.

The origin and nature of the interest of Mrs. Hendricks in the estate of M. M. Hendricks, deceased, is explained by the evidence. Montague M. Hendricks, the father of the plaintiff, died in May, 1884, leaving a large estate. By his will, he devised his real and personal estate to trustees, in trust, to receive the rents, income, and profits during the life of his wife, with directions to pay a certain sum thereout annually to his wife, and to distribute the remainder in equal parts to five children (other than the plaintiff), and Justina B. Hendricks, the plaintiff's wife, but in case of her remarriage after the death of the plaintiff, her share was to be paid thereafter to her issue by the plaintiff. The provision in favor of Justina, the wife of the plaintiff, concludes as follows: "It is also my will that whatever moneys may be received by the said Justina under this clause are to be by her applied to the maintenance and support of herself and her issue by her present husband." The trustees paid to Justina, during her life, out of the income to which she was entitled under the will, the sum of three thousand dollars, the first payment being made November 5, 1884. She died in July, 1885, and the trustees paid to her administrator, after her death, $2,743.18, for income which had accrued on her share prior to her death, but which had not been paid over. It appears that the relations between the plaintiff and his wife were not friendly, and in the fall of

1884 they separated and lived apart until the death of the wife, the children (five in number), with one exception, remaining with the mother, and being supported by her. The nature of the difficulty between the parents is not disclosed, nor does it appear under what circumstances the separation took place. The plaintiff presented to the administrator of the wife a claim against her estate for the advances made, which was referred under the statute, and judgment therefor has been awarded, and the point on this appeal respects the right of the plaintiff to have the contract made with his wife enforced against her estate.

The contract was void at law. The common-law doctrine that husband and wife could not contract with each other has not been changed in this state by legislation respecting the rights of married women. The entire and absolute disability of married women to enter into any legal contract, which was a stubborn and inflexible principle of the common law, has, indeed, in some respects, been modified. She may now, under our laws, purchase real and personal property, and carry on business on her own account, and, as incident to these rights, she may enter into contracts with third persons for the purchase and sale of property, or in the prosecution of her separate business, enforceable in a legal action, to the same extent as though she was a *feme sole*. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts in the eye of a court of law to the same extent now as before the recent legislation: *Yale* v. *Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; *White* v. *Wager*, 25 N. Y. 328; *Frecking* v. *Rolland*, 53 Id. 422; *Cashman* v. *Henry*, 75 Id. 103; 31 Am. Rep. 437. If any exception exists, it has been created by the act of 1887, not applicable to the transaction in question.

But the doctrine of the unity of husband and wife, by which the legal existence of the wife was deemed to be merged in that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. It may be more accurate to say that courts of equity disregard the fiction upon which the common law proceeded, and are accustomed to lay hold of and give effect to transactions or agreements between husband and wife, according to the nature and equity of the case. A court of equity does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between

other persons, have constituted a contract, and give relief, as matter of course, if a formal contract be established, but it further inquires whether the contract was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it. The jurisdiction in equity has been frequently exercised to enforce contracts or agreements for settlement, made between husband or wife before or after marriage in favor of the wife, whether made with or without the intervention of trustees. Reference to the cases will be found in the elementary treatises. It has also been exerted, though less frequently, to enforce agreements in favor of the husband for a settlement out of the property of the wife, or to charge her separate estate in his favor: *Cannel* v. *Buckle*, 2 P. Wms. 243; *More* v. *Freeman*, Bunb. 205; *Livingston* v. *Livingston*, 2 Johns. Ch. 537; *Gardner* v. *Gardner*, 22 Wend. 526; 34 Am. Dec. 340; 2 Kent's Com. 167. But courts of equity do not entertain jurisdiction to enforce mere voluntary agreements not founded upon any consideration, either in favor of the wife against the husband or in his favor against the wife; but if they have been consummated, and are fair and just, courts of equity will uphold the transaction, except as against creditors: *Reade* v. *Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520; 2 Story's Eq., secs. 986, 1377, and cases cited.

It is insisted, on the part of the appellant, that the agreement of Mrs. Hendricks to contribute out of her estate to the maintenance of herself and the family is not supported by any consideration, since the law casts upon the husband the duty of maintaining his household. There is no doubt that the primary obligation is upon the husband to provide for the support of his wife and their infant children, and as between the husband and wife, the latter is not bound to maintain her husband and children during his life out of her separate property, even although his means may be inadequate: *Hodges* v. *Hodgens*, 4 Clark & F. 323; 11 Bligh N. R. 62. But when the income of the wife has been applied, with her consent, to the maintenance of the family, she can make no claim for reimbursement out of the husband's estate. The question was considered in *Jaques* v. *Methodist Episcopal Church*, 17 Johns. 548, 8 Am. Dec. 447, where it was held by the court of errors, reviewing the decision of the chancellor, that, where the wife agreed by parol before marriage, concurrently with the making of a marriage settlement, to defray the expenses of the

family establishment out of her separate estate, the husband is not only not accountable for the moneys received by him of his wife, and expended for that purpose, but was entitled also to an allowance for all advances made by him therefor.

In the present case, the agreement entered into by the wife was, in substance, to share with the husband in defraying the expenses of herself and the family, and to reimburse him for advances made by him for her under the arrangement. There was a technical consideration for her promise in the payment by the husband to her of a gross sum of money for expenses, to be applied in her discretion, which he was not bound to do under his common-law obligation to support his wife and children. In considering the equity of the arrangement, it is an important fact that the income which the wife pledged for her husband's reimbursement came from the bounty of her husband's father, and that it was the intention of the testator that she should apply it for the maintenance and support of herself and her children. It is not necessary to decide whether, under the quite peremptory terms of the will, the wife took the income charged with a trust, enforceable in favor of the children to the extent necessary for their support and maintenance, although there are many authorities which at least give color to this contention: *Bonser* v. *Kinnear*, 2 Giff. 195; *Pushman* v. *Filliter*, 3 Ves. 7; *Leach* v. *Leach*, 13 Sim. 304; *Raikes* v. *Ward*, 1 Hare, 445; *Woods* v. *Woods*, 1 Mylne & C. 401; *Carr* v. *Living*, 28 Beav. 644; *Cole* v. *Littlefield*, 35 Md. 439; *Chase* v. *Chase*, 2 Allen, 101. But see *Clarke* v. *Leupp*, 88 N. Y. 228; and *Byne* v. *Blackburn*, 26 Beav. 41.

If there were no other circumstances bearing upon the general equities than those already stated, it seems to us that the contract made by the wife for reimbursement of the advances made by the husband was reasonable and just, and ought to be enforced. There is certainly no moral reason for forbidding a wife, having a separate estate, to contribute thereout to the support and maintenance of the family, or to contract to do so There was sufficient consideration for her agreement in this case, and the terms of the gift to her in the will of the plaintiff's father imposed upon her a moral duty to carry out his intention. She, instead of the son of the testator, received the share of the estate which, under ordinary circumstances, would have gone to her husband. Why the son was excluded from the bounty of the father does not appear. But we think

facts were offered to be shown on the part of the defendant, which the referee excluded, material to the inquiry whether the contract in question ought in equity to be enforced. The defendant offered to prove that between the time of the separation of the parties, in September, 1884, and the death of the wife, in July, 1885, the latter expended in the support of herself and her children a sum exceeding the entire income to which she was entitled under the will, including both the amount paid to her in her lifetime, and that received by her administrator after her death; and further, that the debts owing by the wife at her decease exceeded the sum collected by her administrator from the estate of the testator, on account of income accrued but unpaid at her decease. If the wife expended for the support of herself and her family an amount equal to or exceeding the whole income which accrued to her under the will, there would seem to be no equity in the claim of her husband for the enforcement of the contract in question. The fact that he made advances for the maintenance of his family, and exacted from his wife a promise of reimbursement, gave him, we think, no equitable claim against his wife's estate, under the circumstances offered to be proved. His advances, under those circumstances, ought to be treated as if made in fulfillment of his general marital obligations. We think both facts were competent as bearing upon the equity of enforcing the contract. Whether the wife actually applied out of her own means, in support of the family, a sum equal to or greater than the income which accrued to her under the will, or obtained supplies in part on her own credit, contracting debts therefor, which were unpaid at her death and became a charge on her estate, is not material. In either case there would be no equity in the plaintiff's claim.

The fact that this is not a proper proceeding for ascertaining the debts owing by Mrs. Hendricks at her death is unimportant. The creditors will not, it is true, be bound by any adjudication as to their debts in this proceeding. But the plaintiff having presented his claim and demanded judgment therefor against the estate of his wife, it was competent for the administrator, in answer thereto, to show any facts which tend to prove that it has no legal or equitable foundation.

We think the judgment of the general and special terms should be reversed, and the case remitted to the surrogate for further proceedings.

HUSBAND AND WIFE — CONTRACTS BETWEEN. — The subject of contracts between husband and wife under the American statutes is discussed in note to *Kantrowitz* v. *Prather*, 99 Am. Dec. 599–601. A deed directly from husband to wife, or from wife to husband, vests the equitable title in her or him, even though such deed is void at law: *Turner* v. *Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and particularly note 323–326, upon the subject of conveyances from a wife to her husband. So a conveyance by a husband to his wife of realty held by them as tenants by entireties is valid: *Enyeart* v. *Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94; but see *Manning* v. *Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note; *Corcoran* v. *Corcoran*, 119 Ind. 138; 12 Am. St. Rep. 390, and note.

In the case of *Munger* v. *Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273, it is said that "the right of the husband to act as the agent of his wife, and to contract with her, has been repeatedly recognized in this state, and it has been held that the conveyance of real estate directly from the husband to the wife would be upheld, so far as it was equitable to uphold the same"; citing *Horder* v. *Horder*, 23 Kan. 391; 33 Am. Rep. 167.

BEAVER *v.* BEAVER.

[117 NEW YORK, 421.]

TRUSTS. — TO CONSTITUE AN EXPRESS TRUST, there must be either an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created.

TRUST CANNOT BE IMPLIED FROM THE MERE DEPOSITING OF MONEYS IN A BANK by one person in the name of another.

GIFT. — TO CONSTITUTE A VALID GIFT, there must be, on the part of the donor, an intent to give and a delivery of the thing given to or for the donee in pursuance of such intent, and, on the part of the donee, acceptance. The delivery may be symbolical or actual. In the case of bonds and choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if this is the intention; and where the debt is that of the donee, the delivery may be accomplished by a receipt acknowledging payment.

GIFTS. — THE ACCEPTANCE OF A GIFT MAY BE IMPLIED where the gift is otherwise complete, and is beneficial to the donee.

GIFT FROM A FATHER TO HIS SON WILL NOT BE IMPLIED FROM THE DEPOSIT IN BANK of moneys by the father in the name of the latter, of which the son never had any knowledge, if the father did not at the time of the deposit make any declaration of his intention, and he then received a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, were made evidence of the right to draw the deposit, and such rules further declared that no person had any right to payment of any part of the principal or interest without presenting the pass-book.

ACTION by plaintiff, as executor of Aziel G. Beaver, against the Ulster County Savings Institution, to recover moneys deposited with it. After the commencement of the action the administrators of John O. Beaver were substituted as defend-

ants in place of the bank, they claiming the money as a part of his estate. The bank paid the money into court. The moneys in controversy constituted two deposits, the first of which was made July 5, 1866, and the second on October 5th, in the same year. The first deposit was made by John O. Beaver in person, and the moneys deposited belonged to him. Aziel G. Beaver was the son of John O. Beaver, and in 1866 was residing with his father, and was seventeen years of age. The deposit was made by John in the name of Aziel. The rules of the bank required that the depositor making the first deposit should subscribe a declaration of his assent to the by-laws. When the deposit was made, the treasurer presented to John O. Beaver a declaration as follows: "I, Aziel G. Beaver, of Esopus, Ulster County, hereby request the officers of the Ulster County Savings Institution to receive from me $854 and open an account with me." This declaration John O. Beaver signed with his own name. The savings bank then entered upon its books an account with the following heading: "Dr. Ulster County Savings Bank, in account with Aziel Beaver," and credited said Aziel with a deposit of $854. Under the name of Aziel Beaver the words "payable to John O. Beaver" had originally been written. Pass-books were issued and delivered to John O. Beaver with a similar entry, and also having originally written the words "payable to John O. Beaver," and these words, "payable to John O. Beaver," were erased from the pass-book and also from the account on the bank-book before the pass-pook was delivered, but there was no evidence to show how they came to be written in the first instance, nor at whose suggestion, nor under what circumstances they were erased. The son died in 1886, leaving a wife, but no children. The father died in 1888, having retained the continuous possession of the pass-books until his death, and having, in April, 1867, drawn $27.29 from the account, and receipted therefor in his own name. It did not appear that Aziel ever had possession of the pass-book, or knew of its existence or of the deposit. In May, 1870, he opened an individual account with the same bank in his own name, which continued until March, 1886. John O. Beaver had eight or nine pass-books in the bank, representing deposits made in the names of other persons. One of the rules of the bank was, "drafts may be made personally or by the order in writing of the depositor (if the institution have the signature of the party), or by latter's attorney, duly authenticated, but no per-

son shall have the right to demand any part of his principal or interest without presenting the original book, that such payment may be entered therein." There was also another rule of the bank, stating that "although the institution will endeavor to prevent fraud or imposition, yet all payments of persons presenting the pass-books issued by it shall be valid payments to discharge the institution." Both rules were printed in the pass-book. Judgment was entered by the trial court in favor of the plaintiff, and was affirmed by the general term on appeal.

A. T. Clearwater, for the appellant.

F. L. Westbrook, for the respondent.

ANDREWS, J. It is found that the money with which John O. Beaver made the deposit of $854.04, July 5, 1866, belonged to him. The inference that the deposit, $145.96, made October 5, 1866, was also made by him from his own means, does not admit of reasonable question. The pass-book was at all times in his possession. Concurrently with the last deposit, the amount was entered therein. It is affirmatively shown that Aziel, who was then a minor, lived with his father, and had no money of his own, and the circumstances are quite satisfactory to show that he never, at any time during his life, knew of the bank account. The question in the case turns upon the legal effect of the deposit, made in connection with the attendant and subsequent circumstances. If they establish either a trust in favor of Aziel as to the $854.04, deposited July 5, 1866, or a gift of the fund deposited, then clearly the subsequent deposit would, in the absence of explanation, be impressed with the same character, and be governed by the same rules. On the other hand, if the first deposit was not affected with any trust, and was not a gift, neither is the last one. Both were the property of John O. Beaver, or both the property of the son, either by a beneficial or legal title.

The trial court seem to have sustained the transaction as a gift, but at the same time refused to find that there was no trust. There is no warrant under the decisions of this court to uphold the deposit of July 5, 1866, as a trust. The case of *Martin* v. *Funk*, 75 N. Y. 134, 31 Am. Rep. 446, established a trust in favor of the claimant in that case in respect of a fund deposited by another in a savings bank to his own credit, in trust, for the former, the latter taking from the bank at the time a pass-book, in which the account was entered in the

same way. The court applied the doctrine that the owner of a fund may, by an unequivocal declaration of trust, impress it with a trust character, and thereby convert his absolute legal title into a title as trustee for the person in whose favor the trust is declared. There was no declaration of trust, in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust, there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust *inter vivos* could be established, in the absence of express words, by circumstances capable of another construction, or consistent with a different intention: *Young* v. *Young*, 80 N. Y. 438, 36 Am. Rep. 634, and cases cited.

The plaintiff's title to the fund must depend, therefore, upon the question of gift. The elements necessary to constitute a valid gift are well understood, and are not the subject of dispute. There must be on the part of the donor an intent to give and a delivery of the thing given to or for the donee, in pursuance of such intent; and on the part of the donee, acceptance. The subject of the gift may be chattels, choses in action, or any form of personal property, and what constitutes a delivery may depend on the nature and situation of the thing given. The delivery may be symbolical or actual, that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes, or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; and so, also, where the debt is that of the donee, it may be given, as has been held, by the delivery of a receipt acknowledging payment: *Westerlo* v. *De Witt*, 36 N. Y. 340; 93 Am. Dec. 517; *Gray* v. *Barton*, 55 N. Y. 72; 14 Am. Rep. 181; 2 Schouler on Personal Property, secs. 66 et seq. The acceptance also may be implied where the gift, otherwise complete, is beneficial to the donee. But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consum-

mated act, which changes the title. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give, or of an actual present gift, yet unless there is delivery the intention is defeated. Several cases of this kind have been recently considered by this court: *Young* v. *Young*, 80 N. Y. 438; 36 Am. Rep. 634; *Jackson* v. *Twenty-third Street R'y Co.*, 88 N. Y. 520; *In re Crawford*, 113 Id. 560.

We are of opinion that there is lacking in this case two of the essential elements to constitute a gift by John O. Beaver to his son of the money deposited July 5, 1866, viz., an intent to give and a delivery of the subject of the alleged gift. The only evidence relied upon to establish an intent on the part of the father to make a gift to his son is the transaction at the bank on the day the deposit was made, in connection with the relation between the parties. There is no proof of any oral statement made by the father on that occasion disclosing an intention to make a gift, and not a *scintilla* of evidence that afterwards, during the twenty years which elapsed before the son's death, the father made any declaration or in any way recognized that the money belonged to the son, or had been given to him. Evidence offered on the part of the defendant of declarations of John O. Beaver, made on the day of the deposit and afterwards, inconsistent with the theory of an intent to give the money to Aziel, were excluded on the objection of the plaintiff. The acts of John O. Beaver after the account was opened tend strongly to negative the claim that the money was deposited with intent to give it to the son. The drawing out of the interest by John O. Beaver on one occasion, his retention of the pass-book for twenty-two years, and procuring it to be written up from time to time, the fact that the son, so far as appears, never was informed of the existence of the account, are strong indications that John O. Beaver did not make the deposit in the son's name with intent to make a present gift of the money. The father dealt with the account as his own, and if the control he exercised over it during the minority of Aziel could be reasonably explained on the theory that he acted as the natural guardian of the son, no such explanation is possible as to the sixteen years of the life of the son after he reached his majority.

The trial court having found that there was a consummated

gift, which, of course, includes a finding of an intent to give, this court is concluded from reviewing the finding, if there was any competent and sufficient evidence to support it. The form of the account is the essential fact upon which the plaintiff relies. It may be justly said that a deposit in a savings bank by one person of his own money to the credit of another is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons,—reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits; and the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary condition.

In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case. It may be true that, as between parent and child, a presumption of a gift may be raised from circumstances, where it would not be implied between strangers: *Ridgway* v. *English*, 22 N. J. L. 409. But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this is the natural explanation of the transaction. The circumstance of the erasure in the declaration signed by John O. Beaver, and also in the

account on the books of the bank of the words, "payable to John O. Beaver," throws no light upon the actual intention. If they were originally inserted at the suggestion of John O. Beaver, it would seem to imply that when he went to the bank he did not intend to part with the control of the money, and it is scarcely presumable that he changed his intention at the very time of making the deposit. If the words were inserted by the treasurer without authority, he may have erased them so as to leave no evidence of an intent to evade the law or the rules of the bank in respect to deposits; or he may have done it for some other unexplained reason. Again, it is possible that John O. Beaver desired that the fund should be placed so that it could be drawn on presentation of the pass-book, without the necessity of a written order, and the erasure was made for this reason. In short, the reason for the insertion of the words in the first instance, and their subsequent erasure, is matter of speculation merely, and does not aid in the interpretation of the main transaction.

There was not only a failure to prove an intent on the part of John O. Beaver to make a gift, but the case is, we think, equally defective on the part of delivery. The declaration and request drawn by the treasurer ran in the name of Aziel, as did the promise recited to abide by the rules of the bank. But it was signed by John O. Beaver in his own name, and not as agent for Aziel, and in law was his request and his promise. John O. Beaver took and retained possession of the pass-book on which the rules were printed. The rules prescribed the undertaking of the bank and the conditions to be observed by depositors in requiring payment. Under these rules John O. Beaver had the exclusive dominion over the account, and the exclusive right to draw upon it so long as he retained the pass-book. It was his signature that the bank had, and not that of Aziel, and the rule authorizing drafts by the depositor only applies when the bank has his signature. But the rule also prescribed that "no person shall have the right to demand any part of his principal or interest without producing the original book that such payments may be entered thereon"; and also that "all payments to persons producing the pass-books shall be valid payments to discharge the institution." Under these rules Aziel was never in a situation to control the account, while John O. Beaver had complete authority over the fund at all times. If John O. Beaver had delivered the pass-book to Aziel with intent to give him

the deposit, there would have been a constructive delivery of the subject of the gift: *In re Crawford, supra.* But he never did this or any equivalent act.

We think, for the reasons stated, that the plaintiff failed to establish a gift, or to justify a finding of a gift. The question of gifts, in connection with deposits of savings banks, has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed: *Robinson* v. *Ring*, 72 Me. 140; 39 Am. Rep. 308; *Burton* v. *Bridgeport Sav. Bank*, 52 Conn. 398; 52 Am. Rep. 602; *Marcy* v. *Amazeen*, 61 N. H. 131; 60 Am. Rep. 320; *Schick* v. *Grote*, 42 N. J. Eq. 352; *Scott* v. *Berkshire Co. Sav. Bank*, 140 Mass. 157; Am. & Eng. Ency. of Law, tit. Gifts, and notes.

The cases of *Howard* v. *Savings Bank*, 40 Vt. 597, *Blasdel* v. *Locke*, 52 N. H. 238, and *Gardner* v. *Merritt*, 32 Md. 78, 3 Am. Rep. 115, go furthest towards sustaining transactions similar to the one in question, as gifts, of any we have noticed, but they are distinguishable in material respects from this.

Our conclusion is, that the cause of action in this case was not made out, and the judgment should therefore be reversed, and a new trial ordered.

GIFTS, THE ESSENTIAL ELEMENTS OF. — As to the essentials of a valid gift *inter vivos* or *causa mortis: Appeal of Walsh*, 122 Pa. St. 177; 9 Am. St. Rep. 83, and particularly cases cited in note 87, 88; *Drew* v. *Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255, and note. Where a father set apart certain bonds as a gift to his daughter, but never actually delivered them to her, retaining them at her request for safe-keeping, there was nothing to make the transaction valid as a gift: *Flanders* v. *Blandy*, 45 Ohio St. 108. But a deposit of money by a father in his daughter's name, intending that such deposit should operate as a gift to her, is a valid gift, if she assented to the transaction upon being notified thereof: *Smith* v. *Ossipee etc. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400, and analogous cases cited in note 403.

TRUSTS. — In California, an express trust can only be created by a writing subscribed by the party creating it: *Barr* v. *O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242, and note 245, as to the creation of trusts by parol.

In *Wiseman* v. *Baylor*, 69 Tex. 63, where a creditor accepted a deed absolute upon its face from his debtor, with a parol understanding and agreement by and between the parties that when the land would bring the highest price the creditor, grantee, should sell it, and after paying himself, turn over the balance to the debtor, grantor, it was held that such parol agreement could be enforced against the grantee after he had sold the land, and paid off the debt against it.

McCann *v.* Sixth Avenue Railroad Company.

[117 New York, 505.]

Negligence — Railroad's Liability for Wrong of Conductor. — If a conductor of a street-railroad advances in a threatening manner towards and kicks at a boy who is trespassing on the platform of the car, and the boy, to avoid the kick, jumps off the platform, landing in the middle of another track of the same railway, where he is run over by another car belonging to the same company, which was running at an unlawful speed, the corporation is answerable for the injuries thus received by the boy, though the boy did not see nor look for the car by which he was injured. Except for the act of the conductor, the haste of the boy would seem heedless, and his omission to look for the approaching car would afford evidence of carelessness; but his conduct has to be weighed with that of the conductor; and whether the boy was in fact influenced by the threat of assault, and how far the obedience to the instinct of self-preservation from a visible danger should excuse the failure to look for another not then before him, were questions for the jury.

Action to recover for injuries. The evidence on the part of the plaintiff tended to show that in crossing Sixth Avenue, in New York City, he found his way blocked by a car which had stopped on the track nearest to him, and to get out of the way of a passing truck, he jumped upon the rear platform of the car, and attempted to cross it. While doing so, the conductor kicked at him, and to avoid the kick, he jumped from the platform, and landed in the center of another track, where he was struck and knocked down by the horses of another car of the defendant moving at an unusual rate of speed. After this evidence had been received, the court directed that a judgment of nonsuit be entered against the plaintiff. A motion for a new trial was afterwards made and denied, and the general term, on appeal, affirmed the judgment of nonsuit and the order denying a new trial.

James C. Foley, for the appellant.

D. M. Porter, for the respondent.

Danforth, J. This appeal must prevail. There was, in the first instance, on the part of the plaintiff, evidence of a conclusive nature, and which, if credible, would amount to proof of the negligence alleged in the complaint as ground of defendant's liability. The place of injury was a public street, and the defendant's car was running up-town at an unlawful speed. The way was thus made dangerous to a wayfarer, the horses themselves rendered less manageable, and the car more difficult to stop. There was also evidence of the same nature,

derived from positive testimony and circumstances attending the transaction, from which it might be inferred that the plaintiff failed in no degree to exercise ordinary care. He was technically a trespasser upon another car of the defendant, a down-town car, but then standing at the crossing, for he went upon it, not intending to be a passenger, but to cross its platform, in order to escape a truck which seemed coming down upon him. At that instant, the conductor of the down-town car stepped towards him in a threatening manner, and kicked at him, and the boy, to avoid the kick, jumped from the platform. He did not see the car coming up; nor did he look for it; he alighted in the middle of its track, and was run over. Except for this act of the conductor, the haste of the boy would seem heedlessness, and his omission to look for an approaching car afford such evidence of carelessness as would be quite persuasive. But his conduct is to be weighed with that of the conductor; and for the act of the conductor the defendant is responsible: *Clark* v. *New York etc. R. R. Co.*, 40 Hun, 605; 113 N. Y. 670. Whether the boy was in fact influenced by the threatened assault, and how far obedience to the instinct of self-preservation from a visible danger should excuse his failure to look for another not then before him, were questions for the jury. The defendant could not escape the consequences of its own negligence by pointing to an act of the boy contributing to the accident, if his conduct was induced by the defendant, nor could the latter have the benefit of the boy's misjudgment or want of judgment, if the act of its agent threw him off his balance. The act of the conductor was not only a rude command to leave the car, but, as the result shows, was ill-timed. This seems to have been the view of the learned trial judge, for at the end of the plaintiff's case he denied the defendant's motion for a nonsuit, and it went into evidence.

At the conclusion of testimony from both parties, however, on motion of defendant's counsel, he directed a verdict for defendant. In this there was error. The defendant's evidence was of no higher degree than that of the plaintiff, and at most conflicted with it. Both depended upon the recollection and veracity of actors and eye-witnesses, and whatever might have been the opinion of the court as to its relative value, it was the right of the plaintiff to have the whole submitted to the consideration of the jury. As that right was denied, the judgment should be reversed, and a new trial granted, with costs to abide the event.

Carrier of Passengers is liable for the malicious, willful, or wanton acts of a conductor upon one of its trains, who injures a person, although such person is in fact a trespasser upon the train: *Atchison etc. R. R. Co.* v. *Gants*, 38 Kan. 608; 5 Am. St. Rep. 780; *Hardenbergh* v. *St. Paul etc. R'y Co.*, 39 Minn. 3; 12 Am. St. Rep. 610. But the act committed by the conductor must have been done within the scope of his authority: *Central R'y Co.* v. *Peacock*, 69 Md. 257; 9 Am. St. Rep. 425; in which latter case a street-railway company was held not liable for an assault committed upon one, who has just left the car, by the conductor, who also left the car to assault him, even though the assault was the outcome of a dispute commenced upon the car.

Corporations are Responsible for the Torts of its Servants committed in the course of their employment: *Hussey* v. *Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note.

CASES

IN THE

SUPREME COURT

OF

OHIO.

FOSTER *v.* WISE.

[46 OHIO STATE, 20.]

LIABILITY OF SURETIES ON BOND OF EXECUTOR WHO HAS BEEN REMOVED. — An administrator appointed to fill the place of an executor who has been removed is entitled to receive from the latter his indebtedness to the estate on account of assets received by him, and converted to his own use, and may maintain an action upon the administration bond of the former executor and his sureties to recover the same. He is the successor in the trust of his predecessor, and is clothed with all the rights of the estate he is appointed to administer.

LIABILITY OF SURETIES ON EXECUTOR'S BOND FOR ASSETS PREVIOUSLY CONVERTED BY HIM. — Where an executor, after having collected and converted to his own use all the assets of the estate, gives a new bond, the sureties thereon will be liable for all the assets so collected and converted by him.

ACTION on the bond of an executor who had been removed, prosecuted by his successor in the trust as administrator *de bonis non* with the will annexed. The case was, by agreement of the parties, tried by the court, and upon special findings of fact, it rendered judgment for the plaintiff against the obligors of the bond in suit for the sum of $4,630.20. The following facts were found by the court: Angeline A. Brobst died in 1870, leaving a will, of which Henry Pomerene was the executor. On the 23d of November, 1870, Pomerene was appointed executor by the probate court, by which the will was on that day duly admitted to probate, and gave a bond which was duly approved by said court. On the 15th of March, 1873, he was required to give an additional bond, and on the 22d of March, 1873, he gave such bond, which was duly approved by

said court. Both of these bonds were conditioned according to law. On the 15th of February, 1878, the probate court ordered Pomerene to give a new bond as such executor, which he did on the 20th of February, 1878, with the defendants D. P. Foster and H. H. Hatch as his sureties thereon. This, which was conditioned according to law and duly approved by the court, is the bond in suit. Prior to the giving of the last-mentioned bond, Pomerene had received assets of the estate, and converted them into money, and paid out sums of money as such executor. On November 4, 1875, Pomerene filed his account in the probate court, showing a balance in his hands of $3,736.71, and this account was duly approved by the court, which then ordered him to invest said balance at interest. After the filing of this account Pomerene received no further assets, nor did he ever pay out anything on account of said trust, except some interest thereon to Sophia Shriver, who was entitled thereto under the will. Up to the time of his removal Pomerene acted only as executor of the will, and no trustee was appointed. Before the giving of the bond in suit, Pomerene had wasted all of the estate of said Angeline A. Brobst, and converted it to his own use, so that at the time when the defendants Foster and Hatch signed said bond as sureties there was, in point of fact, no money or property belonging to said estate on hand unwasted. On the 13th of March, 1882, Pomerene was removed as such executor, and Isaac Shriver was appointed administrator *de bonis non* with the will annexed. Before the commencement of this suit, Shriver, who had duly qualified as such administrator, demanded of said Pomerene payment of the sum found to be due from him to said estate by the order settling his account, but Pomerene neglected and refused to pay him the same, or any part thereof. On the 2d of June, 1884, said Isaac Shriver was removed as such administrator, and on the 25th of June, 1884, Henry A. Wise was duly appointed and qualified as administrator *de bonis non* with the will annexed, and the action was duly revived in his name as such administrator. A motion for a new trial was overruled, and exceptions reserved. The circuit court affirmed the judgment, and this proceeding is prosecuted to reverse both judgments.

MINSHALL, J. No question is made upon the record as to the amount due the estate from the principal, Henry Pomerene, for assets received by him, and converted to his own use.

The contention is, — 1. That the amount found due by the probate court, being for assets that had been received and converted to his own use by the executor, and so not in specie, cannot be recovered upon the bond by the successor in the trust; and 2. That the sureties upon the bond in suit are only liable for assets converted by the principal after its execution, and that they are not liable for assets received and converted by him prior to its execution.

1. The first contention is based upon what was the rule of the common law. By that rule an administrator or executor, who had resigned or been removed, was liable to no action at the suit of the administrator *de bonis non*, except for the recovery of such assets as remained in specie unadministered; and the several creditors, legatees, and distributees, to whom he was liable, were driven to their several suits, if their claims remained unpaid. This resulted in great inconvenience. As observed by Thurman, J., in *Tracy* v. *Card's Adm'r*, 2 Ohio St. 442: "There might be as many suits as there were individuals of these various classes; the expenses of litigation were oftentimes greater than the amount to be recovered; and the difficulties in doing justice between the parties and properly settling the estate were manifold and grievous." The learned judge then shows that this rule was abrogated at a very early day in this state, by the enactment of a statute which transfers the entire estate to the administrator *de bonis non*, and authorizes him to maintain a suit for its recovery.

The provisions on the subject as codified are found in section 6020 of the Revised Statutes. By this section the right is conferred on an administrator appointed in the place of one who has been removed, not only to maintain a suit against his predecessor and the sureties on his bond for "all the personal effects and assets of the estate unadministered," but also for "all damages arising from the maladministration or omission" of such predecessor. So that, whether or not we regard the liability of an executor or administrator to the estate, for assets that he has received and converted to his own use, as itself an asset of the estate (*Brown* v. *State*, 23 Kan. 235), there can be no question but that such conversion is maladministration for which he and his sureties are liable in damages upon his bond at the suit of his successor in the trust.

The question should, however, be regarded as settled by the decision in *Slagle* v. *Entrekin*, 44 Ohio St. 637, where it was held that, under section 6020 of the Revised Statutes, an

administrator appointed to fill the place of an executor or administrator who has resigned or been removed is entitled to receive from the latter his indebtedness to the estate on account of assets received and converted to his own use, and may maintain an action upon the administration bond of the former executor or administrator and his sureties to recover the same. The authorities are there collected.

In legal propriety there is no such office as an administrator *de bonis non* under our statute regulating the settlement of the estates of deceased persons. An administrator appointed to fill the place of a personal representative, who has resigned or been removed, is the successor in the trust of his predecessor, and is clothed with all the rights of the estate he is appointed to administer, and is therefore entitled to recover the indebtedness of his predecessor to the estate for assets received and converted to his own use, as well as for such as remain in specie.

2. The sureties upon the second bond having been relieved by the court upon the motion of one of them, the principal, Pomerene, was required to give a new bond, which he did by executing the one in suit with the defendant H. H. Hatch and the intestate of the defendant Harriet L. Foster as sureties thereon; and the court having found that prior to this time the executor had collected all the assets, and converted them to his own use, it is now claimed that the sureties on the bond in suit are not liable therefor. In other words, their claim is, that they are only liable for such assets as were converted by the executor after the execution of the bond on which they are sureties, and that the sureties on the prior bonds are alone liable for such as were converted before. This we think is not tenable. The case relied on, *Eichelberger* v. *Gross*, 42 Ohio St. 549, is not in point. There the suit was on the first bond that had been given by a guardian, and the sureties on it were held liable for an embezzlement of the funds by the guardian before the second bond was given. All that is there said as to the liability of the sureties upon the second bond was outside of the case, and mere *obiter*. The obligation of the bond is the thing to be considered. It, among other things, stipulates that the executor "shall administer, according to law and to the will of the testatrix, all her goods, chattels, etc., which shall at any time come to the possession of the said executor." The discharge of this obligation required that the executor should administer the estate as required by

the law and the will, or deliver it to his successor to be so administered, should he resign or be removed. The fact that prior to executing the bond he had converted the assets to his own use in no way affected the obligation to account for all that had been received by him belonging to the estate; and it was to secure this obligation that the bond was required and given. There has been, it seems, no direct decision upon the question by this court, but what has been said is supported by the general current of the decisions in the other states: *Scofield* v. *Churchill*, 72 N. Y. 565; *Pinkstaff* v. *People*, 59 Ill. 148; *Choate* v. *Arrington*, 116 Mass. 552; *Brown* v. *State*, 23 Kan. 235; *Bobo* v. *Vaiden*, 20 S. C. 271; *Morris* v. *Morris*, 9 Heisk. 814.

In *Pinkstaff* v. *People*, *supra*, it is said: "Whether he [the administrator] had in fact used the trust funds or not, when this [the second] bond was given, they were, in the eye of the law, then in his hands to be administered, and the bond was given as security that they should be so administered." And in *Brown* v. *State*, *supra*, it is said that the liability of an administrator to an estate for amounts he has received and converted to his own use is "assets in his hands belonging to the estate," which it is his duty to make available to the estate, as required by law. Some of the authorities are to the effect that where a surety on an administrator's bond petitions for relief, and a new bond is required and given, the second bond becomes the primary security, not only as to the surety who petitioned, but also as to the other sureties on the first bond: *Bobo* v. *Vaiden*, and *Morris* v. *Morris*, *supra*.

Whether the sureties upon the bond in suit have the right to compel contribution from the sureties upon both or either of the other bonds, need not now be determined. It is sufficient to determine, as we now do, that they are liable to the present administrator upon the bond given by them for the entire indebtedness of the executor to the estate for whose faithful administration of its assets they bound themselves as sureties. There is no privity of contract between them and the sureties upon the prior bonds, and any remedy they may have against them must be sought in a proper suit for that purpose: *Choate* v. *Arrington*, *supra*. This is an action for money only, and they have no right to insist that a proper judgment against themselves should be delayed until they may be able to recover from another a part of what has been adjudged against themselves.

It is also argued that, at the time the bond in suit was given, Pomerene held the assets as trustee under the will by which he was authorized to invest them for the benefit of Mrs. Shriver. It is a sufficient answer to this to say that he never qualified as such trustee, and no such investment was made. He cannot therefore be regarded as having acted in any other capacity than as executor: *Prior* v. *Talbot*, 10 Cush. 1. Moreover, the sureties on the bond in suit are estopped from asserting that he had ceased to be an executor, and was only a trustee. In all cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing: *Douglass* v. *Scott*, 5 Ohio, 195.

Judgment affirmed.

SURETIES. — Where there are two sets of sureties of an executor or administrator upon bonds given at different times, both sets are answerable for breaches committed prior to the execution of the second bond: *Dugger* v. *Wright*, 51 Ark. 232; 14 Am. St. Rep. 48.

LIABILITY OF SURETIES ON SUCCESSIVE BONDS: Extended note to *Crawn* v. *Commonwealth*, 10 Am. St. Rep. 843-860; *County of Pine* v. *Willard*, 39 Minn. 125; 12 Am. St. Rep. 622.

AS TO THE EXTENT OF THE LIABILITY OF SURETIES upon the bonds of executors and administrators: Note to *Commonwealth* v. *Stub*, 51 Am. Dec. 519 et seq.; *Deobold* v. *Opperman*, 111 N. Y. 531; 7 Am. St. Rep. 760.

SUCCESSIVE ADMINISTRATIONS. — Failure of an administrator, who has succeeded a former administrator, to collect from his predecessor a balance due from him to the estate upon the settlement of his accounts as administrator, does not release the sureties upon the bond of the former administrator from their responsibility for such balance: *In re Connolly*, 73 Cal. 423.

ANDREWS *v.* LEMBECK.

[46 OHIO STATE, 38.]

IMMUNITY FROM SERVICE OF SUMMONS, WHEN PARTY ENTITLED TO. — A person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is privileged from the service of summons while going to, remaining at, and returning from the place of such hearing.

MOTION to quash summons. Julius Lembeck commenced an action against E. E. Andrews in the common pleas of Medina County, and applied for a temporary injunction therein. Being unable to obtain a hearing before either of the judges of that subdivision, he served on Andrews a notice of an intended application to one of the judges within the district, at

his place of residence in Cuyahoga County, for such injunction. The application was accordingly made. Andrews, on the advice of his counsel that his presence might be needed, attended the hearing. After the hearing was had, and before he had time to leave for home by the first train, he was served with a summons issued from the court of common pleas of Cuyahoga County, in an action brought against him by Lembeck. Lembeck used no fraud, nor had he any intention of bringing Andrews into Cuyahoga County for the purpose of securing the service upon him. The common pleas, on motion, quashed the summons, and dismissed the action. The circuit court reversed this order, and this proceeding is prosecuted to reverse this judgment of reversal.

Boynton, Hale, and Horr, for the plaintiff in error.

Henderson, Kline, and Tolles, for the defendant in error.

OWEN, C. J. The sole question for our determination is, whether a person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is privileged from the service of summons while going to, remaining at, and returning from the hearing of such application.

The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered: *Lyell* v. *Goodwin*, 4 McLean, 29; *Miles* v. *McCullough*, 1 Binn. 77; *Bolton* v. *Martin*, 1 Dall. 296; *Hayes* v. *Shields*, 2 Yeates, 222; *Wetherill* v. *Seitzinger*, 1 Miles, 237; *Greer* v. *Youngs*, 17 Ill. App. 106; *Halsey* v. *Stewart*, 4 N. J. L. 366; *Huddison* v. *Prizer*, 9 Phila. 65; *Holmes* v. *Nelson*, 1 Id. 217; *Matthews* v. *Tufts*, 87 N. Y. 568; *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713; *Juneau Bank* v. *McSpedan*, 5 Biss. 64; *Anderson* v. *Rountree*, 1 Pinn. 115; *Lamkin* v. *Starkey*, 7 Hun, 479; *Dungan* v. *Miller*, 37 N. J. L. 182; *Seaver* v. *Robinson*, 3 Duer, 622; *Merril* v. *George*, 23 How. Pr. 331; *Cole* v. *Hawkins*, Andrew, 275; *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269; *Person* v. *Grier*, 66 N. Y. 124; 23 Am. Rep. 35.

The contention that the application of this principle should be or is confined to cases where the suitor is served with process, while attending upon judicial proceedings without his state, is not supported by sufficient force of reason to justify the distinction. The cases may differ in degree, but not in the principle involved.

It is maintained, however, that in this state the subject is regulated and the question determined by statute; that sections 5022 to 5030, inclusive, fix the rights of parties litigant as to the jurisdiction within which defendants may be served and required to answer. It is conceded that none of these provisions affect or apply to the case at bar. Section 5031, it is asserted, applies to all other actions of every kind. It provides: "Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian, or trustee," etc.

It is maintained, further, that if other evidence were required that the entire matter of immunity from service of a summons was intended to be covered by statute, it is furnished by those provisions which regulate immunity from civil arrest.

Section 5457 designates particularly all the persons who shall either absolutely, or at certain times, be privileged from arrest, and it includes "all suitors . . . . while going to, attending, or returning from court." Section 5458 fixes the time and places which shall be free from the disturbance liable to follow from an arrest.

Section 5459 provides: "Nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear; and all arrests, not contrary to the provisions herein contained, made in any place, or on any river or watercourse within or bounding upon the state, shall be deemed lawful."

Counsel for defendant in error say, concerning the foregoing provision: "This language, taken in connection with the other sections already alluded to, would seem to admit of no doubt that the legislature fully considered the entire subject and attempted to regulate it; and in so doing recognized that, while the arrest of a suitor during the progress of his suit, and for a reasonable time in going to and returning from it, might subject him to serious interruption, the service of summons in a civil action could have no such effect."

We shall see that this view has not been adopted by the judiciary of our state. In *Compton* v. *Wilder*, 40 Ohio St. 130, Wilder, a citizen of Pennsylvania, was extradited from that state upon a requisition issued by the governor of Ohio, upon application of Compton, in a criminal prosecution instituted by him in Hamilton County. After Wilder had entered into a recognizance to appear before the court of common pleas at its then next term, and before conviction, and before he had an opportunity to return to his home, he was served with both a summons and an order of arrest issued in a civil action brought by Compton against him in Hamilton County. On motion, not only the order of arrest, but the summons, was set aside. If the position of counsel is well chosen, the summons was improperly set aside. The court held, however, and we think correctly, that both the order and summons were rightfully set aside.

If the contention of counsel is sound, the statutes above cited have provided for those cases where parties are decoyed by trick and subterfuge from their own into a strange jurisdiction to be then called upon to answer to the suit of some adventurer; for surely the latter of these provisions is broad enough to cover such cases.

We are unanimously of the opinion, however, that the general assembly neither intended nor attempted to comprehend within the purview of these enactments cases where service of summons is procured and made in fraud of the law, or cases like the one at bar (admitted to be free of active fraud), where the tendency is to impede or embarrass the free and complete administration of justice in the courts.

The authorities already cited hold that privilege from the service of summons has existed from time immemorial, and has been upheld by both the federal and state courts. The rule of law announced by them with such unanimity ought not to be considered to have been abrogated by any implication from the language used in section 5459. As the court say in *Anderson* v. *Rountree*, 1 Pinn. 115: "It is a principle of common law that privileges are not to be taken away by the general, comprehensive words of a statute; we cannot do by construction what is not clearly authorized by the legislature."

Sedgwick, in his work on statutory and constitutional law, page 318, says: "An ancient and settled system ought not to

be overturned, except by clear, unambiguous, and peremptory language."

In *Matthews* v. *Tufts*, 87 N. Y. 568, the court said: "This immunity does not depend upon statutory provisions."

The court in *Lamkin* v. *Starkey*, 7 Hun, 479, said: "The court has power independently of the statute to protect its officers, suitors, and witnesses from molestation by means of process from the court; this special protection is afforded for the sake of public justice."

Our conclusion is, that the language, "served at any time with a summons or notice to appear," in section 5459, cited *supra*, and "may be summoned," etc., in section 5031, *supra*, is to be held to contemplate such a service of summons as, according to the course of proceedings at the common law (where *capias* corresponded in its uses to our summons), is free from the objection that it is either in active fraud of the law, or tends to impede or embarrass the administration of public justice, by deterring suitors from freely attending upon all proceedings which concern them or require their presence. This language contemplates such process and such service as, by well-known principles, constitute "good service."

The service upon Andrews was in clear violation of this salutary rule, and was properly quashed by the court of common pleas. In reversing this judgment, the circuit court erred, and for this error the judgment of the circuit court is reversed.

PROCESS. — Service of process upon one does not confer jurisdiction over his person when he has been decoyed within the jurisdiction for the purpose of service upon him: *Dunlap* v. *Cody*, 31 Iowa, 260; 7 Am. Rep. 129, and note 136; *Steele* v. *Bates*, 2 Aiken, 338; 16 Am. Dec. 720, and note 723–725. So the resident of one state, going into another state as a witness in an action in which he is a party, cannot be legally served with a summons at the suit of the party plaintiff in the action he goes to defend: *Wilson* v. *Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and note, in which is cited *Van Horn* v. *Great Western Mfg. Co.*, 37 Kan. 523; *Feibleman* v. *Edmonds*, 69 Tex. 334.

WEST *v.* WEYER.

[46 OHIO STATE, 66.]

RENTS AND PROFITS OF ESTATE IN COMMON, LIABILITY OF CO-TENANT TO ACCOUNT FOR. — Under the Ohio statute, the voluntary and profitable use, occupation, and enjoyment by a tenant in common of the common estate creates a liability against him to account, according to the justice and equity of the case, to the out-tenant, as for his share of the rents and profits received by the former. And if the occupying tenant uses and enjoys the profitable possession of lands belonging to the common estate for the purpose of pasturing his cattle, it will be no defense to an action to account that he had sufficient pasturage of his own for his cattle, and did not need said land for that purpose.

TENANT IN COMMON NOT LIABLE FOR INTEREST WHEN. — Where no demand is made upon the occupying tenant in common, either for possession of the common estate or for the value of the use thereof, before the commencement of an action against him by his co-tenant to recover for the use, he is not liable to account for interest upon the amount found due to his co-tenant for such use.

SUIT for partition of real estate, and for an account of the rents and profits received by the defendant below, A. P. West, a tenant in possession of the lands. The plaintiff and defendants were tenants in common of about 146 acres of land, of which about 100 acres were in pasture, and the rest in woods. A. P. West owned the land adjoining, and there was no fence between his land and the land described in the petition. He pastured cattle on his land, and without erecting a partition fence he could not have used his own pasture, unless he permitted his cattle to pasture upon the land described in the petition. His cattle fed upon the land in question during the several years that he was in possession, but he did not cultivate or crop the premises, or receive any rent for it from others. He did not occupy the premises adversely to any of his co-tenants, nor did he exclude any of them from the possession thereof. The premises were not leased to him, nor did any of his co-tenants ask or demand possession of the premises, or any share of the rents and profits thereof before the commencement of this suit. The court found that defendant West should account to the other tenants in common for his use and occupation of the real estate described in the petition, with interest on the annual installments of rent to date, and rendered judgment accordingly. This proceeding is brought to reverse said judgment.

Steel and Hough, for the plaintiff in error.

Newby and Morrow, for the defendants in error.

OWEN, C. J. The principal question in the case involves a construction of section 5774 of the Revised Statutes, which provides that "one tenant in common or coparcener may recover from another his share of the rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case," etc. The fact that no such remedy was available at common law led to the enactment of the statute of Anne (4 Anne, c. 16, sec. 27), which provides that "actions of account shall and may be brought and maintained . . . . by one joint tenant and tenant in common, ... against the other, as bailiff for receiving more than comes to his just share or proportion," etc.

It is contended by the plaintiff in error that neither this statute nor our own authorizes a recovery by the out-tenant against the tenant in possession for the value of the mere use and occupation of the joint estate. There are cases which seem to sustain this construction of the statute of Anne, *supra*, where the tenant in possession is to be regarded as a bailiff of the out-tenants. A bailiff in husbandry was, at the common law, one appointed by a private person to collect his rents and manage his estates: Bac. Abr. The leading English case which holds that mere use and occupation by a tenant in common did not create a liability against him to his co-tenants is *Henderson* v. *Easen*, 17 Ad. & E., N. S., 701, 718. The court says: "It is to be observed that the statute does not mention lands or tenements, or any particular subject. Every case in which a tenant in common receives more than his share is within the statute, and account will lie when he does receive, but not otherwise. It is to be observed, also, that the receipt of issues and profits is not mentioned, but simply the receipt of more than comes to his just share; and further, he is to account when he receives, not takes, more than comes to his just share." Further construing the language of the statute, the court concludes that use and occupation merely do not render the possessory tenant in common liable to his co-tenants. It will be observed that the word "profits," whose absence from the statute of Anne is made prominent by the court, is supplied in our statute. This construction of the English statute has been followed in this country in *Sargent* v. *Parsons*, 12 Mass. 149; *Woolever* v. *Knapp*, 18 Barb. 265; *Crane* v. *Waggoner*, 27 Ind. 52; 89 Am. Dec. 593; *Ragan* v. *McCoy*, 29 Mo. 367; and other cases. A different view was taken of the same question in *Thompson* v. *Bostick*, 1 McMull.

Eq. 75, where the court says that "to cultivate and have the use of lands is to receive the rents and profits, though the occupier is his own tenant," etc. In *Early* v. *Friend*, 16 Gratt. 47, 78 Am. Dec. 649, the judge, speaking for the court, says: "With all deference to the court of exchequer chamber, I think the construction they put upon the word 'receiving' is too technical and narrow, at least, for our country. . . . . I do not see the force of the distinction drawn by that court between the words 'receive' and 'take,' in this connection. I think the word 'receiving,' in the statute, literally means a receiving of profits as well by use and occupation as by renting out the property." This view is taken in *Shiels* v. *Stark*, 14 Ga. 429; and in a recent case in Vermont, *Hayden* v. *Merrill*, 44 Vt. 336, 8 Am. Rep. 372, where the court say: "It is safe to say that where the occupancy of one tenant in common is beneficial, and at a profit to such occupant, and is entire and exclusive, he is bound to account to his co-tenant for what he has received by such occupancy more than his just proportion." We think this the better view.

The question does not rest, however, upon a construction of the statute of Anne, nor upon its assumed similarity with our own. In framing the latter, the general assembly departed from the phraseology of the English statute. The language, which in the latter limited the liability of the tenant in possession to that of bailiff, is omitted. The words "rents and profits" are added. Then we are not at liberty to conclude or say that the words "according to the justice and equity of the case" were added without a purpose. This court has said in *Conard* v. *Conard*, 38 Ohio St. 467, construing this statute: "The action given by the statute is a 'civil action' for rents and profits 'received' by a co-tenant in excess of his full share, 'according to the justice and equity of the case.' The case made upon this record is not an action for the recovery of money merely, but for an account according to the principles of equity, in which neither party had a right of trial by jury. In this respect, at least, our statute differs from the English statutes of 4 Anne, chapter 16, section 27, which gave an action at law against a co-tenant as bailiff."

We conclude that the voluntary and profitable use, occupation, and enjoyment by a tenant in common of the common estate creates a liability against him to account to the out-tenant as for his share of the rents and profits received by the former, according to the justice and equity of the case.

2. It is maintained, however, that in the peculiar circumstances of the case at bar the judgment against the plaintiff in error is wholly without equity. The lands occupied by him adjoined his own, and there was no partition fence between them; he had ample pasture of his own, and for the cattle pastured upon the common estate, and did not need the pasturing with which he was charged. Nevertheless, he did use the lands, and the value of that use was $150 per year. What effect the trial court gave to the conscious possession of these lands, as shown by the fact that "during different years of the time he was in possession he fed his cattle on the wood-land of the premises described in the petition," we are not permitted to know. If he voluntarily used and enjoyed the profitable possession of the lands, it would not seem to be a defense against an action to account that he did not need them, — that he had sufficient pasturage of his own for his cattle.

The trial court was called upon to deal with all the facts according to principles of equity, and while this case seems at first view to sound in hardship, we cannot say that it is sufficiently clear to us that the court so far ignored the justice and equities of the case as to justify us in reversing its judgment.

3. Was there error in charging the interest?

The plaintiff in error was in no sense in default. His possession of the common estate was rightful. No demand was made upon him for its possession, nor for the value of the use until the suit was brought. The claim was one as for unliquidated damages. There was no warrant for charging him with interest upon each annual installment of the yearly rental value of the lands. In this there was error, for which the judgment is modified by deducting the interest included in the judgment, and as thus modified, the judgment is affirmed.

CO-TENANCY — RENTS AND PROFITS. — As between co-tenants, the occupying tenant is liable for rent; but by making improvements upon the common estate he is not liable for increased rent thereby; and he cannot recover of his co-tenants compensation for such improvements: *Annely* v. *De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and cases cited in note, as to the liability of an occupying tenant in common for rents and profits. But in the case of *Hamby* v. *Wall*, 48 Ark. 135, 3 Am. St. Rep. 218, it was decided that the sole use and occupation of common property by one tenant in common does not, of itself, render the tenant liable for rent to his co-tenants; but one co-tenant receiving more of the rents and profits from the common estate than his share is liable to his co-tenants in an action of account: *Fry* v. *Payne*, 82 Va. 757.

INTEREST. — As to interest depending upon demand: Note to *Selleck* v. *French*, 6 Am. Dec. 194, 195. Where rents are collected by one tenant in common, his co-tenant may, in an action for money had and received to his use, recover his proportion, with interest thereon, without having made a demand: Note to *Van Rensselaer* v. *Jewett*, 51 Id. 277.

DUNN *v.* AGRICULTURAL SOCIETY.

[46 OHIO STATE, 93.]

LIABILITY OF AGRICULTURAL SOCIETY FOR NEGLIGENCE CAUSING PERSONAL INJURY. — An agricultural society, organized under the statutes of Ohio, which constructs on its fair-grounds seats for the use of its patrons, is liable, in its corporate capacity, to an action for damages by a person who, while attending a fair held by it, and rightfully occupying one of its seats, sustains a personal injury by reason of the society's negligence in the construction of the seats.

ACTION to recover damages for personal injuries received by the plaintiff, Rebecca J. Dunn, brought by her against the Brown County Agricultural Society. In her petition she alleged that the defendant was a corporation duly incorporated under the laws of Ohio; that as such corporation it held its annual fair in the month of October, 1880, to which the public were generally invited; that plaintiff attended said fair, and paid for permission to enter the society's grounds, and witness the exhibition of stock and products on exhibition; that theretofore the defendant had prepared seats for the accommodation of its patrons and persons attending its fairs, and in erecting and constructing said seats was guilty of gross carelessness and negligence, putting into their construction unsound and weak lumber; that the plaintiff, after entering said grounds on the seventh day of October, 1880, was greatly injured by the breaking of the seat upon which she was sitting, causing her to fall a distance of about five feet, without any fault or negligence upon her part; that both bones of her right fore-arm were dislocated, and she was otherwise greatly bruised and injured upon her arm and shoulder, and by reason of said fall and injury she had become crippled and disabled permanently; that she had been put to large expense in the employment of physicians, and had been unable to perform ordinary work by reason of her said injury. She alleged damage in the sum of three thousand dollars, for which sum she prayed judgment. The answer denied "all negligence and want of care charged in the petition," and for a separate

and second defense, alleged that the defendant was "a county agricultural society organized under an act of the legislature of the state of Ohio entitled an act 'for the encouragement of agriculture, passed February 28, 1846,' and has complied with the conditions of said act, and performed all the duties made incumbent on it thereby, and by any other legislation of the state passed since said act. It has been such agricultural society of Brown County, Ohio, since the —— day of ——, A. D. 1849, until the present time, and has held fairs, paid premiums, received moneys from the treasurer of Brown County, and performed all other duties required of it by law as such agricultural society during all that period." The plaintiff demurred to this second defense, on the ground that the facts therein stated did not constitute a defense to the action. The demurrer was overruled, and the plaintiff declining to amend, her petition was dismissed, and judgment was rendered against her for costs. The district court affirmed the judgment, and this proceeding in error is prosecuted to obtain the reversal of both judgments.

W. W. McKnight, for the plaintiff in error.

No brief for the defendant in error.

WILLIAMS, J. The petition, it must be conceded, states a cause of action, to which the paragraph of the answer demurred to is no defense, unless the defendant is protected against liability for its negligence by the law under which it was incorporated, or can in some way derive such protection from it.

There is a class of public corporations, sometimes called civil corporations, and sometimes *quasi* corporations, that, by the well-settled and generally accepted adjudications of the courts, are not liable to a private action in damages for negligence in the performance of their public duties, except when made so by legislative enactment.

Of this class are counties, townships, school districts, and the like. The reason for such exemption from liability is, that organizations of the kind referred to are mere territorial and political divisions of the state, established exclusively for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the

public good in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its own sovereign will, with their particular powers, to assist in the conduct of local administration, and execute its general policy, with no power to decline the functions devolved upon them or withhold the performance of them in the mode prescribed, and hence are clothed with the same immunity from liability as the state itself: *Board of Commissioners* v. *Mighels*, 7 Ohio St. 119; *Finch* v. *Board of Education*, 30 Id. 37; 27 Am. Rep. 414; *State* v. *Powers*, 38 Ohio St. 54; *Bigelow* v. *Randolph*, 14 Gray, 541; *Lloyd* v. *Mayor etc.*, 5 N. Y. 369; 55 Am. Dec. 347; *Bailey* v. *Mayor etc.*, 3 Hill, 531; 38 Am. Dec. 669; *Riddle* v. *Locks and Canals*, 7 Mass. 169; *Brown* v. *South Kennebec Agricultural Soc.*, 47 Me. 275; 74 Am. Dec. 484.

This rule of exemption, however, extends no further than its reason, and therefore has no application to corporations called into being by the voluntary action of the individuals forming them for their own advantage, convenience, or pleasure. Corporations of this class, which are but aggregations of natural persons associated together by their free consent for the better accomplishment of their purposes, are bound to the same care in the use of their property and conduct of their affairs, to avoid injury to others, as natural persons; and a disregard or neglect of that duty involves a like liability.

When, therefore, it is determined to which of these classes of corporations the defendant belongs, a decision of the case is reached; and to do this, an examination of the statutes under which the organization of the defendant was effected becomes necessary.

The act of February 28, 1846, and the amendments thereto, in so far as they aid this inquiry, in substance provide that thirty or more persons, residents of the county, may, by organizing themselves into a society for the improvement of agriculture, adopting a constitution and by-laws for their government, and appointing the customary officers, become a body corporate, with capacity to sue and be sued, "and perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests" of the county and state; and when they shall pay to the treasurer of the society, "by voluntary subscription, or fees imposed on its members, any sum of money in each year not less than fifty dollars," they are entitled, upon the certificate of the president,

verified by the oath of the treasurer, to the effect that such payment has been made, to draw from the county treasury an equal amount, but not to exceed two hundred dollars. The societies are also made capable "of holding in fee-simple such real estate as they have purchased or may hereafter purchase for sites whereon to hold their fairs," and to receive and make conveyances and agreements in relation thereto. The county commissioners are authorized, "if they think it for the best interests of the county and society," to contribute out of the county treasury, for the purchase or lease of such site, a sum equal to or greater than that paid by the society for the purchase or lease thereof, but no tax shall be levied for a sum greater than that paid by the society, unless a majority of the electors of the county voting at some general election shall vote in favor of such tax. The society is empowered to sell its fair grounds "in such manner and on such terms as it may deem proper," and conveyances therefor may be executed by the president; but "grounds owned partly by the society and partly by the county" cannot be sold or encumbered without the consent of the commissioners, and when sold, the conveyance must be executed by the commissioners, as well as the president of the society. The money arising from the sale is required to be paid into the county treasury, and cannot be paid out without the consent of the commissioners.

The duties enjoined on such societies are, to "offer premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements as they may deem proper," and to so "regulate the amount of premiums, and the different grades of the same," that "small as well as large farmers" may "have an opportunity to compete therefor." They are required to publish a list of the awards, and an abstract of the treasurer's report, in the newspapers of the county, and report annually their proceedings, with a synopsis of the awards, a description of the improvements, and the condition of agriculture in the county, to the state board of agriculture.

From this summary of the statutes, it is apparent that corporations formed under them are not mere territorial or political divisions of the state; nor are they invested with any political or governmental functions, or made public agencies of the state, to assist in the conduct of its government. Nor can it be said that they are created by the state, of its own

sovereign will, without the consent of the persons who constitute them, nor that such persons are the mere passive recipients of their corporate powers and duties, with no power to decline them, or refuse their execution. On the contrary, it is evident that societies organized under the statutes are the result of the voluntary association of the persons composing them for purposes of their own. It is true, their purposes may be public, in the sense that their establishment may conduce to the public welfare by promoting the agricultural and household manufacturing interests of the county; but in the sense that they are designed for the accomplishment of some public good, all private corporations are for a public purpose, for the public benefit, is both the consideration and justification for the special privileges and franchises conferred on them. These agricultural societies are formed of the free choice of the constituent members, and by their active procurement; for it is only when they organize themselves into a society, adopt the necessary constitution, and elect the proper officers, that they become a body corporate. The state neither compels their incorporation nor controls their conduct afterward. They may act under the organization, or at any time dissolve or abandon it.

While the authority is not in terms conferred on such societies to hold fairs, and charge for admission to them, the power to "perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests" of the county appears to be ample for that purpose, and also to authorize the society to select the site whereon to hold the fair, adopt plans for buildings and superstructures, and erect them at its pleasure. The society is absolutely free to determine whether it will erect any buildings or seats for the accommodation of its patrons; and if any, what kind, and of what material. It is subject to no control, either in the selection of the material or in the employment of the architect, superintendent, or workmen; and the whole management and conduct of the fair is committed to it and its officers, with the power to determine what shall be done, how it shall be done, and by whom it shall be done. In short, in the execution of the powers conferred on it, the society selects its own agents, is invested with the sole control over them, and may, for its own indemnity, exact such guaranties against the want of skill and care in their employment as it may deem proper, and be able to obtain.

There are cases where a party under no legal obligation to perform an act or service may, nevertheless, be liable for damages caused by his negligence, if he voluntarily enter upon its performance. And though the defendant below was not bound to provide seats for the convenience of persons attending its fairs, and the omission to do so would subject it to no liability, yet, having voluntarily entered upon their construction, for the purpose of being occupied by the people present, and to afford them greater convenience and comfort in witnessing the exhibition, thus constituting, when completed, an invitation to occupy them, as well as an inducement for the patronage of the fair, every consideration of right and justice requires that in their construction the society should have a careful regard for the safety of those for whose use they were designed, and who should act upon the invitation. And since the defendant selected and controlled its own agents and servants, and might, by the exercise of due care in their employment, have secured the construction of seats that were suitable, and therefore safe (for they can be suitable only when safe), that law of social duty which exacts of all that they shall so conduct themselves as not to injure others by their neglect forbids that the defendant should interpose its own incorporation, self-sought and voluntarily maintained, as a shield against liability to one who, being rightfully upon the seats, and free from fault, is injured by reason of its negligence in their construction.

Besides, it is evident that the defendant has, or may have, a corporate fund; for it is authorized to hold, in fee-simple, "such real estate as it has purchased, or may hereafter purchase, for sites whereon to hold fairs"; and there appears to be no limit affixed, either to the quantity or value of the real estate it may so own. True, it is provided that if the county commissioners, with the county funds, contribute towards its purchase, it cannot be sold or encumbered without their consent; but the answer contains no allegation that such contribution was made in the purchase of the defendant's grounds.

Then, again, the statute imposes no limitation upon the amount that may be charged for entry fees, or for admission to the fair; nor is there anything in the statute which requires the society to expend the whole of its receipts in the payment of premiums, awards, or expenses, or for any other specific purpose. They shall offer premiums "as they deem proper," is the language of the statute. The income may many times

exceed the expenditure, and hence, not only may a corporate fund be acquired, but it may be distributed among the members, or held for other disposition, at the pleasure of the society, and the corporation may thus become one of pecuniary profit, with the control and management of property, real and personal; and we see no reason why, for private injuries, caused by the improper management of its corporate property, it should not be held to the same general liability as natural persons who own and manage the same kind of property.

Our conclusion is, that the facts stated in the portion of the answer demurred to are insufficient to constitute a defense to the case made by the petition, and the demurrer should have been sustained.

Judgment of the district court and of the court of common pleas reversed, and the cause remanded, with instructions to sustain the demurrer, and for further proceedings.

AGRICULTURAL SOCIETIES ARE CORPORATIONS AGGREGATE, NOT QUASI CORPORATIONS, and are responsible for personal injuries sustained by reason of their failure to use ordinary care in the erection and maintaining of buildings fit for the purposes of their organization: *Brown* v. *South Kennebec Agl. Soc.*, 47 Me. 275; 74 Am. Dec. 484. But a child attending a public school cannot sue the city maintaining such school by law for personal injuries sustained by reason of the unsafe stair-cases in the school-house: *Hill* v. *Boston*, 122 Mass. 344; 23 Am. Rep. 332, and foot-note.

MANNIX *v.* PURCELL.

[46 OHIO STATE, 102.]

PROPERTY HELD IN TRUST DOES NOT PASS BY ASSIGNMENT FOR BENEFIT OF CREDITORS. — No property held in trust for others by one who makes an assignment for the benefit of his creditors passes by such assignment, and the beneficiaries of such property are free to assert against the assignee every right and claim which before the assignment they could have asserted against the assignor.

PAROL EVIDENCE ADMISSIBLE TO INGRAFT TRUST ON TITLE HELD BY DEED ABSOLUTE ON ITS FACE. — Parol evidence is admissible to show that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses, but such evidence must be clear, strong, and convincing. And if such grantee is an archbishop of the Roman Catholic Church, its rules and canons regulating the mode of acquiring and holding church property are admissible evidence to show that the property so conveyed to him is held by him in trust for purposes of religious worship and other charitable uses.

USES WHICH WILL BE UPHELD BY COURTS. — Property held by a Roman Catholic archbishop in trust for the purposes of public religious worship,

schools, orphan asylums, and cemeteries, is held for uses that will be upheld by the courts, which will see that those uses are not abused, perverted, or destroyed.

PROPERTY HELD BY ROMAN CATHOLIC ARCHBISHOP FOR CHARITABLE USES IS NOT SUBJECT TO PAYMENT OF DEBTS contracted by him in the business of receiving money on deposit upon the terms of paying interest upon it while on deposit, and finally restoring the principal. Such debts cannot be regarded as diocesan debts, to be satisfied out of diocesan or general church property.

ONE PIECE OF PROPERTY HELD UPON SEPARATE TRUSTS IS NOT LIABLE FOR IMPROVEMENT OF ANOTHER. — Where property is held by a Roman Catholic archbishop, in trust, to be devoted to the uses of public religious worship, cemeteries, orphan asylums, and schools, each church, cemetery, asylum, and school is held upon a separate trust and for its own separate uses, and one piece of such property is not chargeable with any part of the expense of improving another, nor of improving church property generally in the diocese.

BENEFICIARIES OF TRUST PROPER PARTIES TO ACTION WHEN. — Where property is held by a Roman Catholic archbishop in trust for the uses of public religious worship, schools, orphan asylums, and cemeteries, although the persons respectively possessing and having charge of such schools, asylums, and cemeteries are unincorporated and otherwise incapable of holding the legal title to the property, they have such an interest therein as will permit them to be represented in court by a number less than the whole of them for the purpose of protecting the property from being seized and sold for the satisfaction of the private debts of the trustee; and changes in the membership of such congregations and bodies do not affect their legal identity.

CLAIM OF TRUSTEE FOR ADVANCES MADE TO PURCHASE OR IMPROVE TRUST PROPERTY. — A trustee for charitable uses who has made advances from his own private means, otherwise than as donations, for the purpose of purchasing or improving the trust property, has a claim upon the particular property purchased or improved, which will pass to his assignee as individual assets; and in an action by the assignee to subject his assignor's assets to the payment of the latter's debts, the court may order an account of the advances so made for the purpose of subjecting such property to the satisfaction of such debts.

TRUSTEE FOR CHARITABLE USES MAY CHARGE TRUST PROPERTY with the reasonable expense of its necessary preservation and improvement, in favor of one who expends money, furnishes materials, or performs labor for that purpose.

CROSS-PETITION IN ERROR MUST BE FILED WITHIN TWO YEARS. — Although a cross-petition in error is not expressly authorized by the Ohio Code, such cross-petition will be allowed as petitions in error are allowed in original actions. But such cross-petition must be filed within two years from the rendition of the judgment. The same limitation applies to it that applies to petitions in error in original actions.

ACTION by an assignee for the benefit of creditors to subject the property of his assignor to the payment of his debts. The facts found by the court below are stated in the opinion of the court. The part of the New St. Joseph's Cemetery stated in

the last paragraph of the opinion to have been devoted to the payment of creditors consisted of eight or ten acres of land cut off from the rest of the cemetery by a road, and which had never been consecrated. It had been used and cultivated by the sexton as a part of his compensation. As conclusions of law, from the findings of fact, the court found that the property held by the archbishop in trust for religious and charitable uses did not pass to the plaintiff by the assignment, and that he could not subject it to the payment of the debts referred to and included in the assignment; that as to certain churches and schools named, the assignee was entitled to recover whatever sums of money, if any, were advanced by the archbishop, or by Edward Purcell, for buying or building, or to aid in buying or building, of said properties, or in improving, repairing, insuring, or for taxes or other purposes, and had not been repaid; that as to certain other churches named, the petition should be dismissed, with costs; that as to certain creditors, including John G. Hendricks, the equity of the case was against them; that the mortgage of Purcell to Louis Nardini was not a lien upon the orphan asylum; that so much of the New St. Joseph's Cemetery as had not been sold for burial lots was subject to sale by the assignee for the payment of debts under the assignment. And the court decreed that if the parties could not agree upon the amounts due from said churches and schools, and as to the amount of ground unsold in said cemetery, the master appointed by the court should proceed to find what, if anything, was due to J. B. Purcell from each of said congregations and institutions at the date of the assignment to the plaintiff, and the amount of the ground still unsold. To the conclusions of law and to the decree, the assignee, the creditors, and the representatives of the various congregations and institutions interested excepted, and having filed motions for a new trial, presented a bill of exceptions, which was signed, sealed, and allowed by the court, and ordered to be recorded.

S. A. Miller, *Hoadly*, *Johnson*, *and Colston*, *Mannix and Cosgrave*, *Stallo and Kittredge*, *and Wilby and Wald*, for the assignee and creditors.

Lincoln, *Stephens*, *and Lincoln*, *and Mathews*, *Ramsey*, *and Mathews*, for all the other churches and institutions.

I. W. Goss, for St. Michael's congregation.

Thomas A. Logan, and Logan and Slattery, for Louis Nardini, trustee.

Yaple, Moos, and McCabe, for St. Mary's congregation.

Oliver, Murray, and Benedict, for the St. Joseph's cemeteries.

E. W. Kittredge, for John G. Hendricks.

OWEN, C. J. 1. The case has been considered by us upon the facts found by the district court. While we have examined the evidence sufficiently to see that it tends to support these findings, we have not undertaken to determine its weight.

These facts, so far as they have engaged the consideration of this court and are involved in this opinion, may be more briefly summarized as follows:—

John B. Purcell was bishop of the Roman Catholic diocese of Cincinnati from 1833 to 1855, and archbishop from that time to and after his assignment, in March, 1879. From 1837 to the time of such assignment, his brother, Edward Purcell, was priest, serving at the cathedral, and also, by appointment of the archbishop, vicar-general of the diocese, to whom was confided the general management and control of the financial affairs of the archbishop. During all the time above mentioned the canons, decrees, and rules of the Roman Catholic Church for the diocese required all property held and used for ecclesiastical purposes to be conveyed to the bishop or archbishop of the diocese by name, his heirs or assigns forever, to be held by him in trust for the uses for which it was acquired. In the manner and for the uses above stated, the churches, school-houses, parochial residences, asylums, seminary, and cemeteries involved in this controversy were acquired and conveyed to "John B. Purcell, his heirs and assigns forever," because the rules and canons of the church required the legal title to be so vested, and for no other reasons. As soon as Edward Purcell came into the diocese, and in his capacity of vicar-general, he began to receive money on deposit (paying interest thereon) and loaning it out upon interest, all with the acquiescence of the archbishop, and so continued to receive money until the indebtedness so incurred amounted to more than three million five hundred thousand dollars, which has been assumed by John B. Purcell as his own.

Finding themselves without available means to pay this indebtedness, they made an assignment in insolvency to the plaintiff, before whom about two million five hundred thou-

sand dollars of indebtedness have been duly proved. It is only necessary to deal with the assignment of John B. Purcell. On March 11, 1879, the latter, in his individual capacity, made his assignment to Mannix in trust for the payment of his debts, of all his property which could at law or in equity be subjected to such payment, expressly excepting all property held by him in trust for others. No specific property was named or described in the deed; but, in addition to the church property held in his own name, the assignor owned a large amount of property which had been deeded or devised to him unaffected by any trust, and which was legally subject to the payment of his debts, and about which there is no controversy. All the church edifices involved in this controversy, except three (which includes the cathedral), were severally bought, built, and paid for wholly by the gifts of the members of the several congregations worshiping therein, respectively, and others, for the sole purpose of public religious worship therein. To the purchase and building of the three excepted as above, John B. and Edward Purcell advanced money by way of loan (and otherwise than as gifts), which, as to the cathedral and St. Patrick's church, in Cumminsville, has not been repaid. Except the money so advanced, these church buildings were paid for by contributions from members of the respective congregations, and others, and the legal title vested in the archbishop, to be by him held in trust for the use of the congregations, respectively, using them as places of public worship. The congregations of the several churches were composed of men, women, and children of the Roman Catholic faith worshiping and receiving the sacraments of the church therein.

These congregations were not incorporated nor organized under any law of the state, nor were they unincorporated associations whose members incurred any personal liability; although some of them had trustees appointed for purposes other than for control over the title to church property. Members could change from one church to another by change of residence, or from mere caprice. Taking a pew and paying the pew rates by a Roman Catholic constituted such person a member of the congregation. Upon leaving the church and going elsewhere, the membership ceased. The churches were open and free to all for purposes of public worship. The pastor of each congregation was appointed by the bishop and removed at his pleasure, but his salary was paid by the congregation; and the pastor for the time being, with his congre-

gation, had actual possession of the church. None of the congregations, nor any bodies of individuals representing them, were so organized as to be capable of holding the legal title to the church property. The other properties held and used for ecclesiastical purposes — asylums, schools, cemeteries (with the qualifying facts found by the court below concerning the property represented by the St. Joseph's Cemetery Association, a part of which was subjected to the payment of creditors) — were, like the churches, openly, notoriously, continuously, and exclusively possessed and used for the purposes for which they were acquired and deeded to the archbishop. But they were so possessed, used, and managed by persons with whom it was impracticable to invest the legal title, by reason of the want of permanency in the *personnel* of their possession and management.

2. The original action was brought by the assignee for the purpose of procuring a sale of all this property free of all clouds and incumbrances by reason of the assertion of the trusts and uses for which it is claimed the archbishop held it; the contention of the assignee being that,—1. The debts before mentioned were not the individual debts of the archbishop, but contracted for diocesan purposes, and that the church property is justly chargeable with their payment, and this prior to all other charges upon the property; and 2. That the archbishop was so far the absolute owner of the property — such was his dominion over it — that it is subject to the payment of even his general indebtedness, and passed by the deed of assignment to the assignee; that there was no trust of which the civil courts can take cognizance or assume control, or which can stand in the way of the ordinary course of administration of the assignment.

Except as to the claim of John G. Hendricks for improvements put upon the cathedral property (which will be considered in another connection), the central and controlling question in the case is, whether the church property, including all the property above mentioned, is liable for the debts of the archbishop, contracted as above, and passed to the assignee by the deed of assignment, and is now held by him to be applied to the extinguishment of the indebtedness proved before him. There are in all over two hundred pieces of church property in the diocese described in the petition of the assignee, but it was agreed by counsel upon the trial that fourteen different churches, institutions, and properties, selected

by them as representing the various questions of law and fact in the case, may be considered as representing all the property involved in the controversy.

The case is one of unusual magnitude and interest, as well in the questions as in the amount involved. It has received that consideration at our hands which its importance seemed to demand. We desire to acknowledge our obligation to the eminent counsel, whose great learning, tireless research, and strong presentation of the case in all its varied aspects and complications have so greatly assisted us in its consideration.

3. It will facilitate the consideration and disposition of this question to keep in mind a few fundamental facts and propositions which assume prominence at the threshold of the investigation. The archbishop, in his official capacity, has made no assignment. The diocese of Cincinnati has not gone into insolvency, nor have any of the churches or other institutions involved in this controversy. We are not dealing with church debts, nor with the assets of the church. John B. Purcell, the individual, made an assignment in insolvency of all his individual property to an assignee, to be by the latter applied to the payment of his individual debts. No property held by him in trust for others could or was intended to pass by deed of assignment: 1 Perry on Trusts, secs. 334–336. This word "trust" is here employed in its legal sense, and is not intended to comprehend mere confidential relations or duties of which the civil courts may not take cognizance or assume control. All property subject, at law or in equity, to the payment of John B. Purcell's debts, whether held nominally in trust or not, passed by the assignment to the plaintiff below. No higher or better right or title to any of this property passed to the assignee than the assignor held. His creditors acquired no new rights or remedies in or against it by force of the assignment. The assignee simply represents them and their rights, which he has undertaken to enforce by the plain processes appointed by statute. They do not, in any sense, stand to the assigned property in the relation of purchasers. The beneficiaries of the property which the assignee is now seeking to subject to the payment of the assignor's debts are free to assert, against the latter, every right and claim which, before the assignment, they could have asserted against the assignor: *Morgan* v. *Kinney*, 38 Ohio St. 610; Burrill on Assignments, sec. 391.

The questions before us are very similar to those which

would have arisen if John B. Purcell, claiming to be in possession of this property, had brought suit to quiet his alleged title against those who now assert the trust, or as if, claiming to be the unqualified owner in fee-simple, had brought his actions against them to recover possession of the several properties held by them. The practical and substantial subject of the present inquiry is, Have these supposed beneficiaries an interest in this property which they can assert as superior to the right of John B. Purcell or his creditors to subject it to the payment of his debts? Another important consideration which should be kept in view is, that none of the defendants are asking to have any trust performed or executed. They are simply standing upon the defensive,—asking that the properties which they respectively speak for and represent be left free from assault; asking that the relations which have obtained between them and their archbishop concerning these properties since they were first respectively possessed and used by them be permitted to continue uninterrupted and unaffected. Instead of asking that the execution of the trusts be decreed, they simply pray that their destruction may be averted. They are content that the legal title to this property should remain where, by all the canons of their church, it has for so many years been reposed; but they ask that the uses to which, during all these years, it has been devoted be not abused, perverted, nor destroyed.

4. The parties have gone back fifteen centuries into the laws and canons of the church for proof of the nature of the tenure by which the archbishop held the legal title to ecclesiastical property. And the proof is overwhelming that he was not invested with an absolute title to it as his own. It is practically conceded that he held it in trust; but the parties are very far from a concurrence of views concerning the terms of the trust. The right to go to the rules and canons of the Catholic Church for the purpose of establishing, defining, and limiting the trust is denied. That parol evidence may be resorted to to ingraft a trust upon a title held by deed absolute upon its face, is a question which, in this state, has passed beyond the range of serious discussion; though the proof in such cases should be clear, strong, and convincing: *Matthews* v. *Leaman*, 24 Ohio St. 615; *Broadrup* v. *Woodman*, 27 Id. 559. The contention is, that to resort to the law of the church as proof upon which to qualify the absolute terms of the grant is to permit the law of the church to supersede or dominate the

civil law; and much sensitiveness is shown by eminent counsel upon this subject. There is here no ground for alarm. It is no innovation upon the law of evidence, in determining questions like the one at bar, to call, in aid of the civil tribunal, upon the law of the particular church involved for the purpose of determining the title to church property. It surely is not unreasonable, in a case like the present, to hold one of the great prelates of the Church of Rome to the terms upon which, by the very law to which he has vowed his fealty, he has consented to accept the legal title to property which is appointed to the uses of the church to whose service he has, with most solemn unction, dedicated his life. It is but a form of establishing, by convenient and very convincing proof, what entered into the contemplation of the parties to the grant at the time the title vested. It has been held that where a religious body becomes divided, and the right to the property is in conflict, the civil courts will consider and determine which of the divisions submits to the church, local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme ecclesiastical tribunal of the denomination in question is binding upon the civil courts: *McGinnis* v. *Watson*, 41 Pa. St. 9; *Ramsey's Appeal*, 88 Id. 60; *First Pres. Society* v. *Langley*, 25 Ohio St. 128; *Ferraria* v. *Vasconcellos*, 31 Ill. 25; 3 Am. & Eng. Ency. of Law, 235. So where a bequest is made for a church, to take effect whenever a congregation should be formed, the proper ecclesiastical authorities are the judges of the formation of such congregation: *Fidelity Ins. Co.'s Appeal*, 99 Pa. St. 443. If by the laws of a Masonic lodge, the master, or of an Odd Fellows' lodge, the noble grand, was to be the repositary of the legal title to all real property of the lodge, to be held in trust for its uses, would there be anything startling in the proposal to prove the law of the lodge in a controversy between the latter and its chief officer, involving the title to such property? Yet in such case it could as well be contended that the courts were permitting the law of Freemasonry or Odd Fellowship to supersede the law of the state as it can now be asserted that we are enforcing the canons and decrees of Rome. It is no more than establishing, by a form of proof which the courts have held to be competent, the terms upon which, by the convention of the parties, the title to church property was granted and accepted.

5. It is to be observed, however, that the court below was not limited to such evidence in determining whether any and what trust was raised upon the title which the archbishop held. Formal written declarations of trust, sworn pleadings in other cases, and other written concessions of the archbishop made before any controversies like the present arose, were before the court to aid in the determination of this question. It is true that from time to time, during the archbishop's service, he exercised acts of apparent private ownership over property held for ecclesiastical uses. He sold property, received the proceeds, reinvested it in other property for church uses, executed mortgages upon property purchased, and received mortgages upon property sold. But so far as appears in the case, all this was done with the free acquiescence of the respective congregations and others interested in the property affected. There was evidence tending to show that the archbishop and his vicar-general represented to depositors that the entire church property was bound for repayment of deposits as well as payment of interest. Counsel maintain that these representations charged such property with a liability to answer to such creditors. The court below very properly omitted to make a finding upon this evidence. The fact, if so found, would have been immaterial. The law will not permit a trustee thus to talk away the trust estate. The infirmity of the argument lies in its assumption of the very proposition in controversy. If the archbishop's control over church property was such that he could encumber it by his mere declarations, it was liable for his debts. He could not estop the *cestuis que trustent* by his words. The latter were found by the court below to have been continuously in possession of the property.

It also appears that the congregations, through representative members, have, without objection from the archbishop, bonded and mortgaged church property in large sums. But prior to the transactions which led to the assignment, no occasion is shown where any collision or difference has arisen between the archbishop and any of the beneficiaries of the church property respecting its management or control. It has been reserved for the case at bar to present, for the first time in the administration of the archbishop, a condition of things which called upon the various beneficiaries to question his right or power, or that of his successor in title, the assignee, to interrupt or interfere, without their consent, with their enjoyment of the uses to which the property has hereto-

fore been devoted. This question is now fairly presented; and the nature of the trust upon which it is conceded the assignor held the property is, for the purpose of determining whether any and what control a court of chancery may assume or exercise over it, squarely presented for adjudication.

6. The contention of the creditors is, that though the archbishop may not have held this property by an absolute, unqualified ownership, yet the vagueness of the alleged trust, the uncertainty and indefiniteness as to the *cestuis que trustent*, together with the absence of all other persons capable of dealing with, acquiring, or encumbering the legal title to this property, necessarily left the holder of the legal title supreme in his power of disposition and control.

Let us once assume that John B. Purcell was a trustee of this property, and a solution of the question at bar is relieved of much of the difficulty which would otherwise involve it.

Wherever there is a trustee there is necessarily a subject of the trust,—the estate; an object of the trust,—the use; and a *cestui que trust*,—the beneficiary of the trust. A trust is where property is conferred upon and accepted by one person on the terms of holding, using, or disposing of it for the benefit of another. Wherever such a trust is shown, it is cognizable by a court of equity. The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum of conscience is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control, to avert its destruction, perversion, or abuse: *Morice* v. *Bishop of Durham*, 9 Ves. 400. It is true that, in some cases, alleged trusts may, as they do, fail by reason of some hard rule of evidence which prevents their proof; but let them once be established, and the power of a court of equity to control their exercise is almost universally conceded.

This was among the earliest subjects of chancery jurisdiction. While it was for a time supposed that the statute of uses (43 Eliz.) was the origin of this jurisdiction, it is now conceded that it antedated that statute, and is now freely exercised in states which do not regard that statute as in force within their jurisdiction: *Urmy* v. *Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615.

7. Indefiniteness in the number and identity of the alleged *cestuis que trustent* is urged as conclusive against the assump-

tion that this property is held upon any trust of which the courts will take cognizance.

The cathedral and other church buildings have been, since their completion, actually and openly possessed and used by their respective priests and congregations; the schools by their pupils and teachers; the orphan asylum by the sisters of charity in charge and about four hundred orphans; and the graveyards (except the part devoted by the court below to the payment of debts) by those in charge, who have daily devoted them to the burial of the dead. It is true that none of these have been incorporated or otherwise organized under any law of the state. Indeed, their immediate management and control have been in such hands as to illustrate that very principle or element of indefiniteness which has, for many centuries, been one of the controlling characteristics of a trust for charitable and pious uses. It is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins: *Fontain* v. *Ravenel*, 17 How. 384; *Saltonstall* v. *Sanders*, 11 Allen, 456; *Russell* v. *Allen*, 107 U. S. 163; 3 Am. & Eng. Ency. of Law, 127; 2 Perry on Trusts, sec. 687. The individual recipients of the charity are constantly changing. For illustration, take the case of a congregation of one of the churches in question. It may be that among those who comprise it there is not one member who worshiped there ten years ago. Yet it is, in legal contemplation, the same congregation. It is the congregation for whose uses, as a place of religious worship, the church has been, from the first, devoted. Its name and the location of its place of worship render its identification easy.

8. Is it such an entity as that it may constitute a beneficiary to support a trust for a charitable use? If these congregations and other beneficiaries are sufficiently tangible and substantial to have a standing in court, the question ought, it would seem, to be resolved in their favor. This seems to us a fair test of the question. Are they in court? They are represented each by prominent members, who answered below for themselves and the other members; the orphan asylum by prominent contributors to its establishment and support, with whom were associated several members of the Catholic sisterhood in charge; the schools are similarly represented, and the cemeteries by the St. Joseph's Cemetery Association, incorporated since the assignment, to which the legal title

has been conveyed by John B. Purcell, or whatever interest then remained in him. It is a well-recognized practice for certain persons, belonging to a voluntary, unincorporated society, and having a common interest, to sue in behalf of themselves and others having a like interest, as part of the same society, for purposes common to all and beneficial to all. In *Beatty* v. *Kurtz*, 2 Pet. 566, several members of an unincorporated Lutheran congregation, having no trustees capable of holding the legal title to church property, were permitted to appear in court, in behalf of themselves and others having like interests, for the purpose of preserving a trust in a lot set apart upon a town-plat "for the Lutheran church," upon which they had established a place of burial and erected a school-house, but the legal title to which was still in the heirs of the original proprietor. See also *Philadelphia Baptist Ass'n* v. *Smith*, 3 Id. 500; *African M. E. Church* v. *Conover*, 27 N. J. Eq. 159; *Hullman* v. *Boncamp*, 5 Ohio St. 242; *Brown* v. *Manning*, 6 Ohio, 298; 27 Am. Dec. 255; *Le Clercq* v. *Trustees*, 7 Ohio, 218; 28 Am. Dec. 641. It does not follow, however, that, in the light of the facts established in the court below, it would not have protected the uses for which the property was held, even if these beneficiaries had not been formally in court. But they are in court.

9. It is scarcely necessary to cite authority to show that the uses for which this property is held are such as the courts will uphold. The education of the youth, the care, education, and nurture of orphans, the religious instruction of the living, and the decent repose of the dead, are among the most prominent and common objects of charitable trusts: 2 Perry on Trusts, secs. 669, 700, 701, 706; 3 Am. & Eng. Ency. of Law, 122; *Gerke* v. *Purcell*, 25 Ohio St. 229 (where some of the property now in controversy is declared to be held in trust); *McIntire* v. *City of Zanesville*, 17 Id. 352; *Trustee* v. *Zanesville Canal Co.*, 9 Ohio, 287.

Surely this court ought not to be expected to declare that the trusts in the case at bar are too vague or indefinite to be recognized by it after its decision in the two cases last cited. It there upheld and enforced a charitable bequest to an unincorporated association "for the use and support of a poor-school which they are to establish for the use of the poor children of the town of Zanesville"; the donee afterwards becoming incorporated. Compared with such a use, the objects of the trusts in the case at bar are simple and definite.

Lane, J., in the case last cited, says, concerning the extent of chancery jurisdiction over charities: "One of the earliest elements of every social community upon its law-givers, at the dawn of its civilization, is adequate protection to its property and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture and sepulchers," etc.

In *Miller* v. *Teachout*, 24 Ohio St. 425, this court sustained a bequest to an executor "for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named."

In *Urmy* v. *Wooden*, 1 Ohio St. 160, 59 Am. Dec. 615, the court sustained a bequest to "the poor and needy, fatherless, etc., of Jefferson and Madison townships, of the county aforesaid, to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality." In *Sowers* v. *Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418, it sustained a testamentary disposition "for the preaching of the gospel of the blessed Son of God, as taught by the people now known as the Disciples of Christ, the preaching to be well and faithfully done, in Loraine County, in Birmingham, and at Berlin, in Erie County, Ohio."

In *Williams* v. *First Pres. Society of Cincinnati*, 1 Ohio St. 478, the court held that a deed to certain persons as "trustees for the Presbyterian congregation of Cincinnati, and their successors forever, for the use, benefit, and behoof of the congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. This bears with much weight upon the questions at bar. In none of these cases could the beneficiaries assert any special pecuniary interest in the trust estate, but the uses upon which the legal title was conferred were recognized and enforced.

10. Much of the complication and difficulty in which the discussion of the present case has involved it arises from an attempt to solve it by the tests which are usually applied to cases of alleged resulting trusts, and from a failure to mark the distinction between active trusts, where the nature of the trust is such as to render it necessary for the purposes of the trust that the legal title should remain in the trustee (who cannot be compelled to convey), and a passive trust, where the *cestui que trust* has the right to be put in actual possession of the property, or the right to call upon the trustee to convey

the legal estate, as the former may direct: Bispham's Eq., sec. 50.

The distinction between resulting trusts and trusts for charitable or pious uses is almost as clear and as broad as that between legal and equitable estates. The foundation of a resulting trust is the payment, or the securing to be paid, by the *cestui que trust*, out of his own means, the consideration of the conveyance, or some part thereof, at its completion: *McGovern* v. *Knox*, 21 Ohio St. 552; 8 Am. Rep. 80. A resulting trust is to be performed or executed by the trustee by transferring the title to the *cestui que trust* at his request: *Millard* v. *Hathaway*, 27 Cal. 119; 1 Perry on Trusts, sec. 165 a.

No one seriously claims that the donors of the various charities now in question — those whose donations and contributions so largely comprise the funds to which they owe their existence — have a definable, pecuniary interest in or claim upon them which is enforceable in any court. Indeed, no such claim is made in their behalf. Nor is any personal or pecuniary interest asserted by or on behalf of those to whose uses they are being devoted. Their interest in them is limited to the enjoyment of these uses. As already observed, they are not seeking nor asking the enforcement or execution of any trusts in their behalf. The trusts which attach to these various properties have been and are still being performed and executed. Each day that public religious worship is held by or the sacraments of the church administered to members of the congregations of any of these churches therein; each day that pupils are instructed in the schools; that the orphans are sheltered and cared for in the asylum; that the cemeteries are opened to receive the dead, — witnesses the performance of the trusts upon which they are held by the archbishop of the diocese. The prayer is identical with that of the bill in *Beatty* v. *Kurtz*, 2 Pet. 566, that they be left undisturbed in the enjoyment of the uses to which the property actually possessed by them has been so long devoted. In this view, the assumed difficulty or impracticability of enforcing these trusts disappears entirely as an element in the case.

Upon this feature of the case the eminent counsel for the assignee, among other things, says: "Can the beneficiaries be the individuals who attend the church, or who constitute the so-called congregations? Certainly not; as no private advantage can be claimed for them, nothing can pass to them, nor can they, as individuals, act in any capacity in relation to the

property. They are not only not an incorporated body or association, but they never can be incorporated as a body, and continue to be part of the Roman Catholic Church. Take away the bishop, and there can be no priest to manage the affairs of the church, and there can be no Catholic Church without a priest. Take away the bishop, and the church is gone forever. The congregation no longer has an existence, and the property must descend to the heirs of the grantee in the deed, unless it is disposed of by the deed of the grantee himself."

It is sufficient answer to this to say that it will be time to deal with such an aspect of the case when such a calamity overtakes the church as the one suggested by counsel.

We are not called upon to prophesy what this court would or ought to do with this property when, if ever, bishop, priests, churches, and congregations are "gone forever." We are dealing with a present, acting bishop (the successor of Archbishop Purcell, deceased), with officiating priests, with living churches, and with worshiping congregations. It is against a disaster quite as fatal as that supposed by counsel that the court is asked to interpose its restraint.

Instead of asking that the head of the church of the diocese convey or be divested of the legal title, the beneficiaries ask that it remain in him upon the same trusts and for the same uses to which, from the first, it has been devoted. Indeed, it is quite indispensable to the existence of the trust that the legal title be held by some one other than the *cestuis que trustent*, who are incapable, by reason of the indefiniteness which characterizes their personalty, of holding it.

11. Was the dominion of the archbishop over this property such as to render it subject, at law or in equity, to the payment of his debts? The debts are almost, if not quite, exclusively such as were contracted in the business of receiving money on deposit upon the terms of paying interest upon it while on deposit, and finally restoring the principal. It surely cannot be seriously claimed that this important branch of the banking business was within the terms of powers of the trust upon which the property was held. It originated with and was prosecuted exclusively by the vicar-general, Edward Purcell. The archbishop stated, among other things upon this subject, that this business had its origin in the failure of the banks, and the desire of the depositors that Father Edward should take their money and keep it for them, they refusing any

security, but trusting to his integrity and good faith; and that he labored for them without compensation, to earn for them interest on their money. While the findings of the court below do not in form embrace one upon this subject, they are entirely inconsistent with any such power, as are also the conclusions of law. The member of the court below who prepared the opinion of the court (Smith, J.), in a very able and exhaustive presentation of the reasons which prompted the judgment, says that "most of the present indebtedness grew out of his brother's banking business, — receiving money on deposit, paying interest, and lending it out on interest. The canon law strictly forbade this to be done by ecclesiastics. All the canonists concur in this testimony. It could hardly be a debt of the trust when the authority creating and regulating the trust strictly forbade it."

There is no serious attempt by any creditor to trace moneys deposited by him into any specified property. There was but one fund. The book-keeping was crude and primitive. While some money deposited must have gone into church property, donations must have gone to pay interest upon and repay the principal of deposits; but the controversy is chiefly between depositors who expected interest, and finally their principal, and those who gave without hope of either interest or principal, except as it came in the enjoyment of the uses to which the property was devoted.

12. The theory that these are diocesan debts, to be satisfied out of diocesan or general church property, is untenable. It is not made to appear in this case that a diocese is a body or an organization capable of owning property or of contracting debts. A diocese is the circuit or extent of a bishop's jurisdiction, — the district in which a bishop exercises his ecclesiastical authority; but it has not been made to appear that it is constituted to hold either the legal or equitable estate in any property which is devoted to church purposes. Certainly no such party was summoned nor made its appearance in this cause, and we have not heard of any complaint of a defect of parties in the courts below. The legal title to all this property is in the bishop; while the equitable or beneficial interest is in the several congregations and others for whose several uses they are respectively held. There seems to be no room for another owner. There is no such triangular title as this theory assumes.

Each of these congregations and other beneficiaries is here

defending for itself and in its own rights. Each piece of property is held upon a separate trust, and for a distinct use. No warrant is shown for charging upon one the expense incurred on account of another.

In the case of *Tuigg* v. *Treacy*, 104 Pa. St. 493, the right to charge upon one congregation of a Catholic Church expenses incurred for the benefit of another was under consideration in the light of the rules of the church. They were under the same general canonical laws which prevailed in the diocese of Cincinnati. The court say: "Whether or not, therefore, Father Treacy (who was pastor of St. Bridget's congregation) paid and expended the money of St. Bridget's as his own, in the St. Joseph's Mission, at the instance and request of the bishop, is not important, as the bishop had no more right to pledge the credit of the congregation in an enterprise it had not undertaken or assumed, and in which it had no particular concern, or to divert the funds of the congregation from their use, than the pastor himself; and neither, it would seem, had any power."

While this is not an adjudication of the power of the archbishop which controls us in the case at bar, it affords strong support to the finding of the court below, especially as the sources of information were practically the same in both cases.

Our conclusion is, that the property sought to be subjected to the payment of the individual debts of John B. Purcell (except so much of the cemeteries as was devoted to such purposes) was "held in trust for others," and did not pass to the assignee by the deed of assignment.

13. Some of the defendants and cross-petitioners acquired judgments upon their claims against John B. Purcell after the assignment, but we are not able to discover how their situations are improved by that fact.

14. The claim of John G. Hendricks, another cross-petitioner below, and cross-petitioner in error in this court, stands upon ground distinct from all others. He obtained a judgment against John B. Purcell, also after the assignment, upon a claim composed in part of an indebtedness for money deposited to bear interest, and in part for improvements and repairs placed upon the cathedral, and for its preservation, at the request of the archbishop. We are all in accord upon the proposition that the latter claim possesses peculiar merit, upon the principle that the trust property should answer for the reasonable expense incurred in its preservation and necessary

repair and improvement. We are not in accord, however, as to the means of effectuating this right. A majority of the court is of opinion that the remedy may be granted in this case, and for this purpose the judgment as to this claim is reversed, and the cause remanded for further proceedings upon this branch of the controversy. The eminent counsel who represents Hendricks predicates his claim to be reimbursed out of the general church property chiefly (to the extent of his entire claim) upon the authority which he maintains is conferred upon the archbishop by an act of the general assembly passed January 3, 1825, which it is claimed was in force at the time of the assignment: 2 Chase's Stats. 1460.

It is entitled "an act securing to religious societies a perpetuity of title to lands and tenements conveyed in trust for meeting-houses, burying-grounds, or residence for preachers."

It is as follows:—

"Sec. 1. Be it enacted, etc., that all lands and tenements, not exceeding twenty acres, that have been or hereafter may be conveyed by devise, purchase, or otherwise, to any person or persons as trustee, trustees, in trust for the use of any religious society within this state, either for a meeting-house, burying-ground, or residence of their preacher, shall descend, with the improvements and appurtenances, in perpetual succession in trust to such trustee or trustees as shall, from time to time, be elected or appointed by any such religious society, according to the rules and regulations of such society, respectively.

"Sec. 2. That the trustee or trustees, for the time being, of any religious society aforesaid, shall have the same power to defend and prosecute suits at law or in equity, and do all other acts for the protection, improvement, and preservation of said property, as individuals may do in relation to their individual property."

Upon this proposition the counsel stands alone, and his contention has provoked a vigorous cross-fire from his co-defendants and the assignee. It is by them contended that the act, if in force, does not and never was intended to apply to the Catholic Church and its bishops. We have not found it necessary to attempt a solution of this controversy. Conceding, for the purposes of the discussion, that it is broad enough to comprehend Catholic bishops and church property, it still falls far short of supporting the claim of Hendricks, that his claim for money deposited is a charge upon church property. It is

maintained that the effect of this statute is to give to the official holding the trust property power to sue and be sued in his own name,—to defend and to prosecute suits at law or in equity,—and to do all other acts, such as to make contracts, which individuals may do in relation to their individual property, for its protection, improvement, and preservation. It is maintained that this act invested the archbishop with all the characteristics of a corporation sole, though it is said that this position is not essential to the argument.

The antecedent of "said property," in the second section of the act, is "all lands not exceeding twenty acres conveyed, etc., to any person as trustee, either for a meeting-house, burying-ground, or residence of their preacher." The power given is, to do acts "for the protection, improvement, and preservation of said property."

As we have indicated, it required no legislation to authorize a charge upon this property for money expended "for its protection, improvement, and preservation." The act in question contemplates the protection, etc., of specific property,—"a meeting-house, burying-ground, or residence for the preacher." There is no pretense that the money deposited by Hendricks was applied to the improvement, etc., of any particular church property. There is evidence that some of it was expended in the education of some young men for the priesthood. But the claim is supported upon the theory that the debt is diocesan, and that diocesan (meaning general church) property should satisfy it. This view of the case has already been sufficiently considered, and an adverse conclusion reached.

15. No cross-petitions in error are filed by the various congregations, etc., to the order of the court below for an account of the assets of John B. Purcell, in the form of claims, for money advanced by him for the construction of various churches, etc.; nor is the claim made that such order is not a final one. We are all impressed with the general equity and fairness of this feature of the judgment below, and it is, for the reasons stated, left undisturbed.

16. Louis Nardini, trustee for Benedetto Gatto, one of the defendants below, filed his cross-petition setting up a mortgage upon the orphan asylum, executed by John B. Purcell, with which issue was joined, trial had, and judgment rendered against him, to which he excepted. He filed his separate motion for a new trial, which was overruled; he excepted, and took his separate bill of exceptions. His claim was adverse

to all the other parties in the case. He failed to file a cross-petition in error in this court within two years after the judgment against him. Has he a standing in this court? A cross-petition in error is not expressly authorized by our code. It was claimed in *Seitz* v. *Union Pac. R'y Co.*, 16 Kan. 131, that the proceeding was unauthorized, and the court so held, and that a separate proceeding in error was necessary. The same question was first presented in this court in *Shinkle* v. *First Nat. Bank*, 22 Ohio St. 516. It was contended that such a pleading was unauthorized. The court, by Welch, J., said: "There is no good reason why cross-petitions in error should not be allowed equally as in original actions. They were allowed at common law, and there is nothing in the code which forbids their use. On the contrary, they are calculated to subserve a leading object of the code, namely, to avoid multiplicity of suits, and to render litigation simple, cheap, and speedy. . . . . To summon the opposite party, who is already in court, and to bring in a copy of the record, a copy of which is already in court, would be a useless labor, and involve an unnecessary expense and delay," etc. The supreme court of Kansas was again called upon to consider this question in *Stettauer* v. *Carney*, 20 Kan. 496, when it overruled its former decision upon the authority of *Shinkle* v. *First Nat. Bank*, *supra*, saying: "We are constrained to believe that in this respect the decisions of the supreme court of Ohio are the better exposition of the law."

Again, in *Bundy* v. *Ophir Iron Co.*, 35 Ohio St. 80, a motion was made in this court for leave to file a cross-petition in error. At the time, no leave was required to file petitions in error. It was said by the court: "As held in *Shinkle* v. *First National Bank*, 22 Id. 516, it is competent for a defendant in error to file a cross-petition asking the reversal of the judgment for errors prejudicial to him, and not assigned in the plaintiff's petition. And as a petition in error may, under the present legislation, be filed without leave of court, the same rule will be applied to the cross-petition."

The just inference is, that if the law had required leave to file a petition in error, the same rule would necessarily have applied to a cross-petition in error. In the case before us the errors which Nardini relied upon were not assigned by the plaintiff in error; he stood upon his own right. The judgment against him stood unchallenged upon the record. There can be little doubt that if the proceeding in error by the plaintiff

had been dismissed at any time before Nardini's cross-petition in error was filed, his branch of the case would also have gone out of court. The logic of the foregoing cases and considerations is, that such a proceeding is the prosecution of a proceeding in error; but to avoid a multiplicity of suits, he may in the same case and upon the same record predicate that prosecution. If a law requiring leave to file a petition in error would apply as well to a cross-petition in error, they are so far upon the same footing as that if the two years' limitation applies to one, it applies with the same force to the other. All parties in whose favor the judgment of which he complains was rendered (and it was in favor of all but himself) had a right to suppose, after the expiration of two years from its rendition, that it stood unquestioned, and was forever at rest. The cross-petition in error was filed too late. This conclusion relieves us of a further consideration of the question arising upon this mortgage, and the judgment thereon is affirmed.

17. The writer of this opinion does not concur in so much of the judgment as remands the case to the court below for further proceedings upon the claim of Hendricks; nor does he concur in the affirmance of so much of the judgment below as devotes a part of the St. Joseph's cemeteries to the payment of creditors, believing that these are quite clearly shown to be trust property, and that they did not pass to the assignee by the assignment.

With the modification above indicated of the judgment against Hendricks, the judgment below is affirmed.

WHAT PASSES TO AN ASSIGNEE FOR THE BENEFIT OF CREDITORS. — An assignee for the benefit of creditors is not a *bona fide* purchaser, and takes subject to all equities against the debtor: *Brown* v. *Brabb*, 67 Mich. 17; 11 Am. St. Rep. 549, and note; *National etc. Bank* v. *Hubbell*, 117 N. Y. 384; *ante*, p. 515, and note; note to *Wilson's Accounts*, 45 Am. Dec. 709; *In re Howe*, 1 Paige Ch. 124; 19 Am. Dec. 395, and note; *Van Epps* v. *Van Deusen*, 4 Paige Ch. 64; 25 Am. Dec. 516. Trust property does not pass by a debtor's deed of assignment for the benefit of his creditors: Flint on Trusts, sec. 240.

RESULTING TRUSTS ARE EXCEPTED FROM THE STATUTE OF FRAUDS, and may be established by parol: *Reynolds* v. *Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note; *Lofton* v. *Sterrett*, 23 Fla. 565; but such parol evidence must be clear and unmistakable: *Sisemore* v. *Pelton*, 17 Or. 546; *Clark* v. *Pratt*, 15 Id. 304.

EXPRESS TRUSTS, HOW CREATED. — To create a trust, there must be an explicit declaration of trust, or such circumstances as will necessarily imply that a trust was intended: *Beaver* v. *Beaver*, 117 N. Y. 421; *ante*, p. 531,

and note; and in California, Iowa, and Mississippi, declarations of trust must be made by means of a written instrument, being void if made by parol: *Barr* v. *O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242; *Hain* v. *Robinson*, 72 Iowa, 735; *Moore* v. *Jordan*, 65 Miss. 229; 7 Am. St. Rep. 641; *Richardson* v. *Haney*, 76 Iowa, 101. But the evidence of a grantee reduced to writing long after the conveyance, admitting a verbal agreement to reconvey upon payment of certain moneys, does not constitute a written declaration of trust: *Hasshagen* v. *Hasshagen*, 80 Cal. 514.

A DEED ABSOLUTE UPON ITS FACE may be shown by parol evidence to have been intended to operate merely as a mortgage: *Turpie* v. *Lowe*, 114 Ind. 37; *West* v. *Hayes*, 117 Id. 290; *Cullen* v. *Carey*, 146 Mass. 50; *Barry* v. *Hamburg-Bremen F. Ins. Co.*, 110 N. Y. 1; but such parol evidence must be clear and satisfactory: *Wright* v. *Mahaffey*, 76 Iowa, 96; *Egerton* v. *Jones*, 102 N. C. 278; *Elston* v. *Chamberlain*, 41 Kan. 354. But while a deed absolute upon its face may be shown by parol evidence to operate as a mortgage as between the grantor and grantee, yet as to third parties the deed will at least be a cloud upon the title: *Hall* v. *Arnott*, 80 Cal. 348; *Moseley* v. *Moseley*, 86 Ala. 289; *Geary* v. *Porter*, 17 Or. 465. The finding of the trial court upon the question of whether a deed absolute upon its face is or is not in reality a mortgage will not be reviewed by the appellate court if there is any evidence tending to support it: *West* v. *Hayes*, 117 Ind. 290; *Dalton* v. *Leahey*, 80 Cal. 446. A deed absolute upon its face may be converted into a trust by parol evidence, but such evidence must be clear and certain: *Adams* v. *Lambard*, 80 Id. 426; *Crow* v. *Watkins*, 48 Ark. 169; *McNair* v. *Pope*, 100 N. C. 404. But in New Jersey, although a valid trust may be created by parol, it must be proved by some writing: *McVay* v. *McVay*, 43 N. J. Eq. 47; and in *Mohn* v. *Mohn*, 112 Ind. 285, it was held that a parol agreement to hold the proceeds of a sale of land in trust for another, if founded upon a sufficient consideration, was valid.

CHARITABLE USES. — As to what bequests are valid as charitable uses: *George* v. *Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754, and note 763.

RHODES *v.* WELDY.

[46 OHIO STATE, 234.]

PROVISION IN WILL FOR AFTER-BORN CHILD. — A devise by a testator of his real estate to his wife for life, and after her death, to the heirs of her body begotten, is not a provision in the will for a child born to him after its execution, within the meaning of a statute which provides that "if the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked, unless provision shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received."

AMBIGUOUS WORDS AND PHRASES, CONSTRUCTION OF. — Where the same word or phrase is used more than once in the same act in relation to the same subject-matter, and looking to the same general purpose, if in one

connection the meaning is clear, and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former.

ACTION to contest the will of John Young, the father of the female plaintiff, Elizabeth Rhodes. The will was made in August, 1862, shortly before the testator entered the army, in which he died in April, 1865. The plaintiff in error, his only child, was born in December, 1862. His widow, Harriet Young, subsequently intermarried with Samuel Weldy, by whom she had five children. The courts below held that the will contained a provision for the plaintiff. The act, upon the construction of which the determination of the case depends, is quoted in the *syllabus*. Other facts appear from the opinion.

George M. Tuttle and Charles Fillius, for the plaintiff in error.

J. R. Johnston and H. H. Moses, for the defendants in error.

OWEN, C. J. If Elizabeth was provided for by the will of her father, it was not revoked by her birth after its execution, and the judgment below should be affirmed. If there was such provision made, it is to be found in these words: "I will and devise to my wife, Harriet Young, all my real estate wherever situate, to use and occupy as to her may seem proper during her natural life, and after her death, to the heirs of her body begotten."

It will not be contended that this is a specific provision for the plaintiff. If it is a provision at all, it is so because the language is comprehensive enough to include her. It was evidently written with a view only to the maternity of the "heirs of her body begotten," and without reference to their paternity. It was intended as a comprehensive direction of the course which the property should take after the immediate object of the testator's bounty should die, unless she should die without issue; in which case, other direction is made in the will. Much learning and research have been expended in discussing the character of the devise in remainder, and whether it is a vested or contingent interest.

In the view we take of the case, this is wholly immaterial. The question is, Has Elizabeth "been provided for in the will," in the sense of the statute? It is not conclusive of this question to say that a "disposition" has been made which may inure to her benefit. "Disposition" and "provision" are not necessarily convertible terms.

This statute has not heretofore been construed by this court. The question is not new, however, to the courts of several of the states, and of England.

In *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111, the question was, whether a younger of two sons was provided for in a certain settlement. By that settlement, an estate was settled upon him expectant upon his mother's death.

The lord chancellor held that the younger son was unprovided for, notwithstanding the expectancy settled upon him, to take effect upon his mother's death. "For," he said, "the mother might survive the father many years, and, in that time, the younger son might starve, if he were to have no other provision."

The case of *Willard's Estate*, 68 Pa. St. 327, is, we think, directly in point. The Pennsylvania statute then in force (Brightly's Purdon's Digest, 1477) provided that "when any person shall make his last will and testament, and afterwards shall marry, or have a child or children not provided for in such will, and die, leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate, and such widow, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will."

In that case, W. W. Willard, the testator, executed his will on the 29th of August, 1864, and died on the 2d of September following, leaving his wife, Catharine E. Willard, *enceinte*, and two children, Anna C. and Lizzie P. Willard, by a former wife. On the 25th of February, 1865, a little over five months after the death of the testator, his widow gave birth to a son, Waldo Wickham Willard.

By the first item of his will, the testator gave the interest of three thousand dollars to his mother during her natural life, and at the death of his mother, "this bequest to revert to my children and heirs." In the second item of his will, he gave, among other things, a house and lot, which he valued at seven thousand dollars, to his wife, to be hers during her natural lifetime, and at her decease, "this bequest of seven thousand dollars to revert to my heirs at law, share and share alike."

In the opinion of Sharswood, J., it is said (page 330): "It is earnestly contended that as this child, Waldo, would certainly

be entitled to his equal share of these reversionary interests, he cannot be said not to be provided for. . . . . Here, however, there was, in effect, no present provision whatever. For all the purposes of education and support, and that for an indefinite period, this son is left entirely dependent upon his mother, unless, indeed, by a sale of his reversionary interest. . . . . But how could even a vested reversionary interest be a provision, unless by a present sale of such reversionary interest? A contingent interest could also be sold. An interest may be vested, as in this case, although the period when it shall fall into possession is uncertain. Such an interest could not be sold for the maintenance and education of the minor except at an enormous sacrifice. Yet what could an orphan's court do under such circumstances? Refuse to sell, and throw the child for maintenance and education on the public? or make a scanty provision for a short period by an immediate sacrifice of all his future estate? We hold, then, that a reversionary interest, whether vested or contingent, is not a provision for an after-born child, within the words or spirit of the statute."

The question was again before the same court in *Hollingsworth's Appeal*, 51 Pa. St. 518, in which the court held that when "a testator gave all his estate to his wife, and if he should have any children living at his death, he appointed his wife guardian of such children during their minority, committing entirely 'to her affection, judgment, and discretion their maintenance, education, and future provision, and which guardianship I intend and consider as a suitable and proper provision for such child or children'; he had no children at the date of the will, but two were born afterwards. Held, that he died intestate as to the children." Read, J., in delivering the opinion of the court, said: "This is clearly no provision for his children, such as is contemplated by our wills act and the policy of the law."

The act above mentioned is the same act that was in force when *Walker* v. *Hall*, 34 Pa. St. 483, and the case of *Willard's Estate*, *supra*, were decided.

The case of *Waterman* v. *Hawkins*, 63 Me. 156, is also suggestive. By section 8 of the Revised Statutes of 1871 of that state, page 564, it is provided that "a child of the testator born after his death, and not provided for in his will, takes the same share of his estate as he would if his father had died intestate." And the question before the court was, whether,

in the case under consideration, an after-born child was provided for, within the meaning of the statute.

The case arose out of the will of John P. McGlinchy, who died February 2, 1869, leaving his widow, *enceinte*, and his father surviving him. His will was executed January 7th preceding. A child, Gertrude, was born two months after the testator's death. By his will, the testator gave to his wife the house, land, and furniture, where they lived, for her natural life, if she remained unmarried, providing, however, that "in case of her marriage, the same is to become the property of my heirs, and its use to revert to them; and in any event, after her decease, the same is to descend to my heirs." All the rest of testator's property was given to his father. The posthumous child, Gertrude, was the sole heir at law of her father.

The real question before the court was, whether a child of a testator born after his death can, in any proper sense of the term, be deemed provided for in the will by a general devise of a reversion to the heirs of the testator; and the court, all the judges concurring, held it cannot be deemed so provided for.

Barrows, J., in the course of the opinion in that case, says: "A general devise of a reversion to the heirs of the testator constitutes no such provision. It would rarely be available for the support of the child when support is most needed; and while the insufficiency of the provision in the will might not entitle the posthumous child to claim a distributive share, in order to bar him, it must definitely appear that some provision relating expressly to him was made." We are not required to say that if the child in such case was actually provided for by the execution of the will, it must be considered revoked because the provision did not relate expressly to her.

So a like statute has been recently before the supreme court of Massachusetts, in the case of *Bowen* v. *Hoxie*, decided September 5, 1884, and published in 137 Mass. 527. The testator executed his will February 28, 1880, and died December 18, 1882, leaving a widow and six children by her, and three children of a former marriage. A little over three months after the testator's death, another child, Pauline, was born. The testator, by his said will, besides other bequests to his wife and nine children, then living, left the sum of fifty thousand dollars, in trust, to pay the income to his wife during her life, and after her decease, to pay over the interest and income

thereof, annually, in equal shares, to my surviving children by my said wife, Abby Elizabeth, with an ultimate distribution of the principal among them. There was no other provision for Pauline by the will, or otherwise. The Public Statutes, chapter 127, section 22, of Massachusetts, provides that "when a child of a testator, born after his father's death, has no provision made for him by his father in his will, or otherwise, he shall take the same share of his father's estate that he would have been entitled to if his father had died intestate."

It was contended by counsel for the child, Pauline, that there was no provision for her in the will, within the meaning of the statute.

Allen, J., in the course of the opinion, says: "In the opinion of the court, the claim in behalf of Pauline must be supported. The will would have full effect without regard to Pauline. The share, if any, which she would receive would come to her only as one of a class. The provision for her is an unintentional one. The most that can be said is, that the provision for a class happens to be broad enough to include her. It does not, under any construction, furnish any certain means for her maintenance and education during that part of her life when she would be unable to do anything toward her own support.

"She might live long, marry, have children, and die, without ever coming into the enjoyment of her share of an interest to which, as one of a class, she might be entitled. Such a result would not only shock the testator himself, but would be contrary to the common feelings of humanity. It is not necessary, and we do not think it is reasonable to hold, that a provision for a class, within which an uncontemplated child happens to fall, excludes the child from a proportionate share of the estate. The statute rather means to include cases where a child born after the father's death has no direct specific or intentional provision made for him."

"Its meaning is, if a father unintentionally omits to provide in his will, or otherwise, for a child born after his death, or in other words, if he omits to make a provision which is intended for such child, the child shall take the same share of estate that he would have been entitled to if the father had died intestate. This construction is in accordance with that adopted by the courts of several states substantially similar."

A case reported in 10 Ga. 80–82, is instructive. The supreme court, construing a statute of that state, which is much

like the Pennsylvania statute, says: "The statute contemplates the present or probable existence of the after-born child, in the mind of the testator when he makes his will, and thereby makes a positive provision for such child. There being no such positive provision made by the testator in his will for this after-born child, we are of the opinion that this is a very clear case of intestacy under the statute."

In the case at bar there surely was no provision for the present support and maintenance of Elizabeth. It is now nearly twenty-six years since her birth, and there has been no time since that event that she could assert a present interest in the estate left by the will of her father. She has passed from birth to womanhood, and is now a wife, and not a penny of this "provision," which it is strongly contended was made for her in the will, has inured or could lawfully inure to her benefit.

If it be contended that the devise to her, or which is made, in terms, broad enough to include her, is a vested interest,—one which she could sell and realize therefrom present means,—the answer is, that she might also sell a contingent interest or a mere expectancy, if in either case she should find an adventurer brave enough to take his chances in an investment so equivocal and unpromising. In that case, a sale would probably be at a great sacrifice. She may live to middle age, and even to moderately old age, and still fail to realize upon this alleged "provision," unless she should in the mean time be unfortunately called upon to mourn her mother's death. If she should die before her mother, it would result that she had passed through life without realizing the slightest benefit or assistance from the will. These considerations are suggested rather as illustrations of the practical workings of the rule contended for than as rules or tests of construction. They serve to illustrate, also, the authorities which are above cited.

The able and industrious counsel for defendants have failed to produce a case which tends to cast doubt upon any of these authorities, or to establish a different doctrine.

2. We are fortunate, however, in finding in this statute very valuable aid in its construction. In the same section, indeed in the same sentence, we find substantially the same expression which has provoked so much discussion concerning what constitutes a provision in a will for an after-born child. The will shall be deemed revoked "unless provisions shall have been made for such child by some settlement," etc. In either

case, the statute contemplates provision for a child which we are to suppose will be of tender years and in present need of means of support. If there be provisions by settlement or provision by will, in either case (and in the one the same as the other) the birth of a child after the execution of the will does not work its revocation.

Fortunately for us, "provisions by some settlement" is a phrase of easy construction. It certainly implies, if not a sufficient, at least a substantial, present means of maintaining the child. A settlement at once suggests the intervention of trustees, upon whom is conferred a fund or property in some form, which constitutes a source of maintenance, education, etc. A provision by some settlement which could not become available until the termination of a life tenancy or interest, and which depended upon the contingency of the beneficiary outliving the life tenant, and which, in case of the latter surviving the former, could never and would never be devoted to the uses to which it was appointed, would be a strange absurdity. *Lamplugh* v. *Lamplugh*, *supra*, is directly in point.

When we have ascertained what a provision for a child of tender years by some settlement is, we shall have made good progress in the solution of the question at bar. It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction. But where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence, in relation to the same subject-matter, and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one connection the meaning is clear, and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former. In *Raymond* v. *Cleveland*, 42 Ohio St. 529, it is said: "Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act or an act to which the provision containing the doubtful word or phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear."

It is said in *James* v. *Du Bois*, 16 N. J. L. 293: "It is no doubt a rule of construction that if a statute makes use of a word in one part of it susceptible of two meanings, and in

another part of the statute the same word is used in a definite sense, we are to understand it throughout in that sense, unless the object to which it is applied, or the connection in which it stands, require it to be differently understood in the two places."

In *Pitte* v. *Shipley*, 46 Cal. 160, the court say: "It is a familiar principle of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended."

This rule is peculiarly applicable to the question at bar. The general subject treated in these two expressions is the same, to wit, a provision for an after-born child which shall save a will from the revocation which must otherwise result from the birth of such child after the execution of the will. Giving to the word "provision" in the one phrase substantially the same construction which the word "provisions" is clearly entitled to in the other, and the conclusion is, that Elizabeth was not "provided for in the will" by the devise of the testator's lands to his wife to use and occupy as to her may seem proper, during her natural life, and after her death, to the heirs of her body begotten; and the judgments below are reversed, and the cause remanded to the circuit court for further proceedings.

PROVISION IN WILL FOR AFTER-BORN CHILD, WHAT IS. — In the note to *Wilson* v. *Fosket*, 39 Am. Dec. 740, will be found an extended discussion of the rights of an after-born child omitted from the will of his parent. As the general subject is there discussed, it is only necessary in this note to consider the question what constitutes a provision in a will for an after-born child of a testator. The decision in the principal case is sustained by the great weight of authority. It is very generally held that a general devise of a reversionary interest to the heirs of the testator, whether it be vested or contingent, is not a provision for an after-born child of the testator: *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Holloman* v. *Copeland*, 10 Ga. 79; *Waterman* v. *Hawkins*, 63 Me. 156; *Bowen* v. *Hoxie*, 137 Mass. 527; *Willard's Appeal*, 68 Pa. St. 327; *Potter* v. *Brown*, 11 R. I. 232. In *Holloman* v. *Copeland*, *supra*, the testator disposed of his property to his wife and children then in life, and two years after he had another child born to him, for whom no positive provision was made, and the testator was held to have died intestate, notwithstanding the fact that such after-born child might be entitled to some portion of the testator's estate under the will on the happening of certain contingencies mentioned therein under the general description of "children." This decision was rendered under a statute containing these provisions: "In all cases where a person having made a will shall . . . . have born a child or children, and no provision shall be made in said will for . . . . child or children after born, and shall depart this life without

revoking said will or altering it . . . . subsequent to the birth of said afterborn child or children, the justices of the inferior court . . . . shall pass an order declaring that such person died intestate."

In *Waterman* v. *Hawkins*, *supra*, the facts of which are stated in the principal case, Barrows, J., delivering the opinion of the court, said: "There must be provision made specifically for the unborn child. He cannot be disinherited like a child, or the issue of a deceased child, when it appears that the omission to refer to him was intentional. Unless he is 'provided for,' the conclusive presumption is, that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate. A general devise of a reversion to the heirs of the testator constitutes no such provision. It would rarely be available for the support of the child when support is most needed; and while the insufficiency of the provision in the will might not entitle the posthumous child to claim a distributive share in order to bar him, it must definitely appear that some provision relating expressly to him was made."

And further: "A child of a testator born after his death cannot, in any proper sense of the term, be deemed 'provided for in his will' by a general devise of a reversion to the heirs of the testator."

In *Bowen* v. *Hoxie*, *supra*, referred to and quoted from in the principal case, C. Allen, J., delivering the opinion of the court, said: "The statute was designed to come in and correct the injustice which would result from establishing and carrying out strictly the provisions of a testator's will in which the claims of a posthumous child were unintentionally overlooked; both for the sake of giving effect to the presumed intention of the testator, and also probably in part with a view to prevent the chance of the child's becoming a public charge."

In the case of *Potter* v. *Brown*, 11 R. I. 232, the testator gave to his daughter two thousand dollars, to be hers upon her attaining the age of twenty years, or upon her marriage, but in case of her death before attaining that age, or marrying, then said sum to be equally divided between her brothers and sisters then living. After the making of the will containing those provisions, the testator had born to him a son, for whom no provision was made except the contingency above mentioned. The court decided that there was no provision made for the after-born child, within the contemplation of the statute. Durfee, C. J., who delivered the opinion of the court in that case, said: "Upon the whole, we think it safer and more consonant with the design of the statute to decide that the bequest over is too precarious to be regarded as a provision for the after-born child, so as to defeat his right under the statute to share in his father's estate as if it were intestate. And accordingly we do so decide." In the case of *Walker* v. *Hall*, 34 Pa. St. 483, the testator devised his whole estate to his wife, and then added: "Having the utmost confidence in her integrity, and believing that should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents." Referring to this language in the will, Read, J., who delivered the opinion of the court said: "This is clearly no provision for his child, such as we have seen is contemplated by the wills act and the whole policy of our law." This language was repeated by the same learned judge in deciding the case of *Hollingsworth's Appeal*, 51 Id. 518, the facts of which are stated in the principal case.

In the case of *Mercantile Trust and Deposit Co.* v. *Rhode Island H. T. Co.*, 36 Fed. Rep. 863, the testator, a married man, having at the time no children, bequeathed to his sister ten thousand dollars if he died leaving no

children, but in case he died leaving children or descendants, he gave her only one thousand dollars. All the residue of his estate he gave to his wife. The court decided that, under the terms of this will, the testator had made no provision for his subsequently born child. In delivering the opinion of the court in that case, Colt, J., said: "It is argued from this that in the Jeremiah Whipple will the second and third clauses show that the testator had in mind the possibility of after-born children, and that in providing so bountifully for the mother, he intended in fact to make provision for any after-born child. The difficulty with this reasoning is, that in providing for the mother he did not in fact make any provision in his will for his after-born child."

Illinois and Alabama seem to be the only states in which a different rule from that laid down in the principal case has been adopted. The statute of the former state provides that "if, after making a last will and testament, a child shall be born to any such testator, and no provision be made in such will for such child, the will shall not, on that account, be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given shall be abated in equal proportions, to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate."

In the case of *Osborn* v. *Jefferson Nat. Bank*, 116 Ill. 130, a married woman, in 1873, devised to her husband, his heirs and assigns, all her estate, provided he should survive her, but in case he should not survive her, and she should die leaving children, then to her child or children, etc. She died in 1880, leaving her husband surviving and three children, all born after the date of the will. It was held that the testatrix had made provision for her children, within the meaning of the statute, notwithstanding the provision made depended upon a contingency. Tunnicliff, J., who delivered the opinion of the court in that case, said: "It is very clear that if there is any 'provision' made in this will for these children, the appellants, or if it appears by the will that it was the intention of the testatrix to disinherit them, then, in either case, the will must stand, and the decree dismissing the cross-bill be affirmed. The contention of the appellants is, that to be a 'provision' for them, within the meaning of the statute, the devise or bequest in their favor must be certain and absolute, and dependent upon no condition or contingency whatever, and that as the devise to them, in this case, is only in the event that the testatrix's husband, Francis, should not survive her, there cannot be said to be any 'provision' made for them by the will; and as to the intention to disinherit, it is insisted that this must not be found by the court from any resort to construction, implication, or inference to be drawn from the will by reason of anything therein contained, unless this intention is so stated in the will in express terms. In our opinion, neither of these constructions should be placed upon the statute. As to the provision for the after-born children, the statute is silent as to its extent, or whether it shall be reasonable or not, as to when it shall commence or when terminate. By its plain, unambiguous meaning, it applies only to children for whom no provision is made by the will, and as to whom it does not appear by the will that they were intentionally disinherited. If any provision is made for them, then they do not come within the purview of the statute. The testatrix was to be the sole judge of what this provision should be; and that the same was not to be left for the determination of the courts is manifest by the second clause of the section, which authorizes the disinheritance of such child or

children altogether, if the testator shall simply indicate by his will that such was his intention. The greater includes the less, and as the testator may totally disinherit such after-born child or children, it would seem to follow that he may limit his bequests to them, if he makes any, to anything, no matter how insignificant it may be, and its enjoyment upon any contingency however remote."

In *Gay* v. *Gay*, 84 Ala. 38, it was held that when a provision for an after-born child of a testator is made by gift or settlement, the nature and extent thereof are left to the discretion of the testator, as when made by will, except that it must not be so grossly inadequate as to be the equivalent of no provision. And it was decided that an antenuptial contract by which, in consideration of the marriage and the relinquishment of all interest in the estate of the husband and testator, real and personal property is conveyed to the wife, in trust, to hold the same during life or widowhood, with the remainder to the issue of the marriage living at his death or at the time of her second marriage, and on the death of such issue unmarried, then to the heirs at law of the testator, is, *prima facie*, a substantial provision for his after-born child. In the statutes of some of the states the provisions in reference to after-born children are in favor of such children not named or provided for in the will. This is the form of expression used in the Missouri statute. Under statutes of this class, the mere fact that an after-born child is not provided for is not sufficient to create an intestacy as to him, provided he is named in the will. In *Beck* v. *Metz*, 25 Mo. 70, the testator, after devising all his property to his wife, added this clause: "In every other respect I leave it entirely to the will and judgment of my said wife, Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." They had only one child, a daughter, and it was held that she was named in the will. So in *McCourtney* v. *Mathes*, 47 Id. 533, the testator devised his property to his widow during her widowhood, but if she should marry, then the estate in her possession should be disposed of, according to law, among his surviving heirs. It was held that the children were named in the will, within the meaning of the statute. And in *Hockensmith* v. *Slusher*, 26 Id. 237, it was even held that a bequest to a son-in-law, though he was not designated as such, was a naming of the daughter, within the statute. But in *Gage* v. *Gage*, 29 N. H. 533, it was decided that the naming of one person, however closely related to another, without more, is no reference to that other; and that the naming of a grandson, and describing him as such, is no reference to his father or mother. This decision was rendered under a statute which provided that "every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, both real and personal, as he would be if the deceased were intestate."

Property acquired by the testator after the execution of the will, where such property is by law unaffected by the will, is not a provision for an after-born child of the testator: *Baldwin* v. *Spriggs*, 65 Md. 373; *Marston* v. *Roe*, 8 Ad. & El. 14. A child who has been adopted by and taken the name of the testator is not unprovided for, when, by the will, made before the adoption, special provision has been made for her by the name she then bore: *Bowdlear* v. *Bowdlear*, 112 Mass. 184. A provision, by settlement, for an after-born child may be made after as well as before the execution of the will: *Gay* v. *Gay*, 84 Ala. 38.

ROLLING MILL COMPANY *v.* CORRIGAN.

[46 OHIO STATE, 283.]

ORDINARY CARE, AS APPLIED TO INFANTS, WHAT IS. — In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct is not to be judged by the same rule that governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

DUTY OF EMPLOYER TO INSTRUCT YOUTHFUL AND INEXPERIENCED EMPLOYEE. — One who employs children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age, under similar circumstances, and is bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is his duty to so instruct such employees concerning the dangers connected with their employment, which, from their youth and inexperience, they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.

INFANT EMPLOYEE MAY RECOVER FOR INJURY TO WHICH HE CONTRIBUTES WHEN. — An infant employee whose employer has not instructed him, as it was his duty to do, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know, and was not advised, would be likely to injure him.

ACTION for personal injuries. The jury rendered a verdict for the plaintiff, and the judgment rendered thereon having been affirmed by the circuit court, the Rolling Mill Company filed its petition in error to reverse both judgments. Other facts are stated in the opinion.

Williamson, Beach, and Cushing, for the plaintiff in error.

Robison and Rogers, for the defendant in error.

WILLIAMS, J. The only questions presented in this case are those arising upon the special instructions given by the court in response to the request of the jury. These instructions, the plaintiff in error contends, are erroneous in their entirety and in detail.

1. First, it is claimed that the court erred in the statement

of the plaintiff's duty in the opening proposition of the charge, wherein the jury were instructed that "it was the duty of the plaintiff to use ordinary care," which the court defined to be "just such care as boys of that age, of ordinary care and prudence, would use under like circumstances," and that the jury "should take into consideration the age of the plaintiff, and the judgment and knowledge he possessed." We have found no decision of this court upon the subject of the contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment, and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes, a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care than is usually possessed by children of the same age. Authors and judges, however, do not always employ the same language in giving expression to the rule. In Beach on Contributory Negligence, section 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care; and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule, that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances, are very numerous. "It is well settled," says Mr. Justice Hunt in *Sioux City etc. R. R. Co.* v. *Stout*, 17 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. . . . . The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." In Shearman and Redfield on Negligence, section 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, as far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be

expected from children of his own age." Another author says "a child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising": Whittaker's Smith on Negligence, 411.

This rule appears to rest upon sound reason as well as authority. To constitute contributory negligence in any case, there must be a want of ordinary care, and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children, and no greater degree of care should be required of them than is usual under the circumstances among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that, in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

That portion of the charge of the court under discussion is in substantial conformity to this conclusion. The care and prudence which a boy of the plaintiff's age of ordinary care and prudence "would use under like and similar circumstances," as expressed in the charge, is such care as "is reasonably to be expected from a boy of his age," or "which boys of his age usually exercise," as the books express it. No different effect is given to the charge of which the plaintiff in error can complain, by the direction to the jury to take into consideration the age of the boy, "and the judgment and knowledge he possessed." This did not diminish the degree of care required by the previous portion of the instruction.

2. It is next insisted that the court erred in charging the jury that it was the duty of the defendant's foreman to instruct the plaintiff in regard to the dangers of his employment. The paragraph of the charge is as follows:—

"If not understanding all the dangers and hazards of the

situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment, and experience, it was the duty of the foreman to instruct him in respect thereto, that he might conduct himself so as to guard against such peril."

This portion of the charge was pertinent to the case. The answer admits that the plaintiff, at the time of his injury, was employed by the defendant in the rolling-mill, and placed under the control of its foreman, who directed him to attend to the turning on and off of the steam at the steam-engines; to do which, he had to stand near a shaft of the engine, which revolved when the engine was in motion, and reach up to turn the stop-valve, which was necessary to put the machinery in motion, or stop it. It further admits that at the time the injury occurred a belt was hanging loose upon the shaft, and that the plaintiff's leg was crushed by the shaft. It was shown by the evidence that the plaintiff was less than fourteen years of age, and had been engaged at that employment but a few days; and that he was placed there by the foreman in the midst of rapidly moving and noisy machinery; that his employment required his constant attention to regulate the speed of the machinery, and that the belt which hung suspended on the shaft near him was given such motion by the shaft that it would come near him and in close proximity to his face; and while the machinery was in motion, the plaintiff's foot in some way became entangled in the hanging belt, by which means the injury was produced. There was also evidence tending to prove the other allegations of the plaintiff's petition. The defendant's foreman, who placed the plaintiff in the position where he received his injury, must have known of the loose hanging belt on the shaft, which could easily have been removed in a few moments, and without expense. It is evident that he knew the situation in which he placed the plaintiff was one of danger, which he might, with a small amount of trouble on his part, have pointed out and explained to the plaintiff.

The almost universally accepted doctrine is, that the care to be observed to avoid injuries to children is greater than that in respect to adults. That course of conduct which would be ordinary care when applied to persons of mature judgment and discretion might be gross and even criminal negligence toward children of tender years. The same discernment and foresight in discovering defects and dangers cannot be rea-

sonably expected of them that older and experienced persons habitually employ; and therefore the greater precaution should be taken where children are exposed to them.

Judge Cooley, in his work on torts, page 652, says on this subject: "The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service. But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience. It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal, carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take special precautions in such cases has sometimes been very emphatically asserted by the courts."

The law "puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same situation as if he were an adult. If the master, or his vice-principal, orders the infant servant to perform a duty in a manner attended with peculiar hazard, and the servant is injured while so doing, the liability of the master is not an open question": Thompson on Negligence, 978.

In *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396, it is said that

"it may frequently happen that the dangers of a particular position for or mode of doing work are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part."

It is distinctly held in *Whitelaw* v. *Memphis etc. R. R. Co.*, 16 Lea, 391, that it is the duty of the master to give such warning, advice, and "instructions to a youthful and inexperienced employee as would enable him, with the exercise of ordinary care, to perform the duties of his employment with safety to himself." See also *Jones* v. *Florence Mining Co.*, 66 Wis. 268; 57 Am. Rep. 269.

It may be safely laid down as a general rule, supported by authority, that persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment, which, from their youth and inexperience, they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.

3. It is finally urged that there was error in that portion of the charge by which the jury were instructed that if the plaintiff was injured in consequence of the defendant's negligence, and he, "by reason of his youth, and want of judgment as to the perils of his position, did some act in the discharge of his duty as he understood it, which also contributed to his injury, but which he did not know to be likely to injure him, and he had not been properly advised and instructed in regard thereto," he could recover.

It is first insisted that the court, having informed the jury in what event the plaintiff was entitled to recover, they should

also have been instructed under what circumstances the defendant would be entitled to the verdict. But since the attention of the court does not appear to have been called to this oversight, if it be one, and no request was made by counsel for such instruction, if the charge given is otherwise unobjectionable, the mere omission to give the further instruction referred to is not sufficient ground for reversing the judgment.

This proposition of the charge is sustained by the authorities already cited, and is clearly within the doctrine of *Coombs* v. *New Bedford C. Co.*, 102 Mass. 572; 3 Am. Rep. 506.

"The question in such cases," says the supreme court of Massachusetts, "is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences."

But if it be a question of due care on the part of the plaintiff, the conclusion must be the same; for a plaintiff's right to recover is not affected by his having contributed to the injury, if he was without fault in doing so. When it is shown that the defendant has been negligent, and his negligence has caused the plaintiff's injury, the latter is entitled to recover, unless it appear that he has been negligent in respect to the matter complained of, and might have avoided the consequences of the defendant's negligence. His conduct contributing to his injury must, to defeat his action, amount to at least ordinary negligence, that is, want of ordinary care. Hence, notwithstanding the plaintiff below may have ignorantly contributed to the injury he sustained, if he was not guilty of negligence in so doing, he might, nevertheless, maintain his action. It is not apparent how, in the case stated in the instruction to the jury, the plaintiff could be in fault, unless his extreme youth and inexperience be a fault. Ignorance may be a misfortune, but when it is not willful, and no duty arises to be informed, with the means of information at hand, it is not negligence of which the person charged with the duty of giving proper instructions on the subject, which he failed to perform, can complain or take advantage.

The instruction negatives any inference of negligence; for, according to it, to enable the plaintiff to recover, it was necessary for the jury to find that he did not know that the act

which he did, that contributed to his injury, was likely to injure him, and that this want of knowledge was owing to his age and lack of judgment and the failure of the defendant to properly instruct him, and that the act so done by him was in the discharge of his duty as he understood it. If, as already seen, it is the duty of persons employing children in dangerous situations to properly instruct them concerning the dangers which, on account of their youth and inexperience, they may not understand, it would seem to follow, as a necessary conclusion, that such employee, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know and was not advised would be likely to injure him.

When the whole instruction is taken together, wherein the jury were at the outset advised that it was the duty of the plaintiff to use ordinary care, it is obvious they could not well have been misled.

Judgment affirmed.

Infants — Negligence. — A child of tender years is *prima facie* exempt from responsibility: *Westbrook* v. *Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and particularly extended note thereto, as to what negligence of an infant will bar his recovery for personal injuries.

Minor Servants. — The instructions and precautions which a master is bound to impart to his minor servants must be graduated with reference to their ignorance and inexperience, so as to make them fully aware of the danger to which they may be exposed: *Smith* v. *Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699.

Minor Employees. — As to what risks are assumed by minor employees, and the employer's duty with respect to such employees: Note to *Fisk* v. *Central P. R. R. Co.*, 1 Am. St. Rep. 28–31; *Brazil Block Coal Co.* v. *Gaffney*, 119 Ind. 455; 12 Am. St. Rep. 422.

DOUGLAS *v.* CORRY.

[46 OHIO STATE, 349.]

DUTY OF ATTORNEY TO PAY OVER MONEY COLLECTED FOR HIS CLIENT does not give rise to a continuing and subsisting trust, within the meaning of a statute excepting such trusts from the operation of the statute of limitations.

STATUTE OF LIMITATIONS BEGINS TO RUN FROM TIME OF COLLECTION of money by an attorney for his client, which should have been paid over, where there has been no fraudulent concealment of the receipt of the money.

PLAINTIFF RELYING ON MISREPRESENTATION OR CONCEALMENT TO TAKE CASE OUT OF OPERATION OF STATUTE OF LIMITATIONS must in his petition aver the facts constituting the fraud, and the time of its discovery; otherwise the petition will be open to demurrer, where it appears on the face of the petition that the action would otherwise be barred.

ACTION to recover money collected by the defendant's testator as attorney for the plaintiff. The defendant demurred to the petition, on the grounds that the action was barred by the statute of limitations, as appeared on the face of the petition, and that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the petition, and the circuit court affirmed this judgment. The plaintiff prosecutes error to reverse both judgments. Other facts are stated in the opinion.

S. A. Miller, for the plaintiff in error.

J. J. Glidden and T. A. O'Connor, for the defendant in error.

MINSHALL, C. J. The only question that arises upon the record is as to whether the claim stated in the petition is barred by the statute of limitations. The money sought to be recovered was collected by the deceased while acting as the attorney of the plaintiff. No demand was made until over six years had elapsed after its collection. When the demand was made, he promised to pay it, but failed to do so. The demand was made in 1880, and he died in the same year, the relation of attorney subsisting up to the time of his death. The claim was presented to the executrix in 1884, and rejected by her; whereupon suit was brought in a few days after, which was some thirteen years after the ten thousand dollars had been received, and seventeen years after the three thousand seven hundred dollars had been received.

The claim is certainly barred on the face of the petition, unless it can be brought within some exception to the rule of

the statute of limitations. This is sought to be done on several grounds:—

1. The first claim is, that the relation of attorney and client being a confidential one, the duty imposed by the relation on the attorney gives rise to a continuing and subsisting trust in favor of the client, and is not within the statute. That there are such trusts is well recognized; but it is equally well settled that trusts of this character are those technical and continuing trusts which are not recognized at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity. This was decided in *Kane* v. *Bloodgood*, 7 Johns. Ch. 110, 11 Am. Dec. 417, after a most elaborate examination of the authorities by Chancellor Kent; and the rule as there stated has generally been followed in this country: *Finney* v. *Cochran*, 1 Watts & S. 118; 37 Am. Dec. 450; *Glenn* v. *Cuttle*, 2 Grant Cas. 273; *Denton* v. *Embury*, 10 Ark. 228; *Fleming* v. *Culbert*, 46 Pa. St. 498; Story's Eq. Jur., sec. 962; Wood on Limitations, 418.

The provision of our code of procedure excepting from the statute of limitations "the case of a continuing and subsisting trust" (R. S., sec. 4974) is simply an incorporation of this rule. The word "trust" is frequently used in a very comprehensive sense; and, as is well said in *Finney* v. *Cochran*, *supra*, to hold that the statute of limitations is not applicable to any case which may, even with propriety, be denominated a trust, would, in a great measure, defeat the plain and manifest intention of the legislature. No equitable relief is required in this case; and the remedy adopted is a plain action at law for money had and received, and is not, then, a case of a continuing and subsisting trust, cognizable only in equity.

2. Again, it is said that no action can be maintained against an attorney for money collected by him for his client until it has been demanded; and from this it is reasoned, and held in several cases, that no action accrues, and consequently that the statute of limitations does not begin to run, until the demand is made. It is true that it is generally held that an action cannot be commenced against an attorney for money collected until a demand has been made by the client: *Taylor* v. *Bates*, 5 Cow. 376; *Ex parte Ferguson*, 6 Id. 596; *Rathburn* v. *Ingalls*, 7 Wend. 320; *Cummins* v. *McLain*, 2 Ark. 402; *Stafford* v. *Richardson*, 15 Wend. 305; Weeks on Attorneys, sec. 308; *Krause* v. *Dorrance*, 10 Pa. St. 462; 51 Am. Dec. 596.

It is not questioned that there may be such circumstances as will dispense with a demand; and in Iowa it is held that the commencement of the suit is a sufficient demand: *Hollenbeck* v. *Stanberry*, 38 Iowa, 325.

But it does not follow, nor do the cases generally hold, that where there has been no fraudulent concealment of the receipt of the money by the attorney, the statute does not begin to run until a demand has been made for its payment. The rule is general, that, in the absence of such concealment, the statute begins to run from the time the money was collected and should have been paid over. The rule as to demand is designed for the protection of the attorney against the annoyance of unnecessary litigation and costs: *Walradt* v. *Maynard*, 3 Barb. 584, 586. The client has it in his power, by making the demand, to commence the action at any time after the attorney has received the money, and refused on demand to pay it over; and, by delaying the demand, he cannot prevent the running of the statute.

The cases in which the contrary has been held have generally been overruled. The case of *Staples* v. *Staples*, 4 Greenl. 532, is frequently cited in support of the claim that the statute does not begin to run until demand made. All that was necessary to be determined in the case was, whether the attorney could be garnished by the creditor of the client. This was pointed out in the subsequent case of *Coffin* v. *Coffin*, 7 Me. 298, where, notwithstanding what was said in the previous case as to the necessity of a demand, it is expressly held that an attorney is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand; and that the statute of limitations begins to run from the time he receives the money. This is sustained by *Glenn* v. *Cuttle*, 2 Grant Cas. 273; *Stafford* v. *Richardson*, *supra*; *Wilcox* v. *Executors of Plummer*, 4 Pet. 172; Wood on Limitations, 41.

In *McDowell* v. *Potter*, 8 Pa. St. 189, 49 Am. Dec. 503, it was held that the statute begins to run from the time the client has notice or means of knowing of the receipt of the money, and that the *onus* is on the attorney to prove such notice or means of knowledge. The case seems to have been followed in *Voss* v. *Bachop*, 5 Kan. 59, with this qualification, that in the absence of proof, the court will presume both notice and demand in a proper and reasonable time. But the question could hardly have arisen in that case so as to make

its decision a precedent, as there had been, as found by the court, such misrepresentation on the part of the attorney as to the receipt of the money as to delay the running of the statute until the fraud had been discovered by the client, which was not until a short while before the action was brought. The case, however, of *McDowell* v. *Potter*, *supra*, must be regarded as overruled by the subsequent case of *Campbell* v. *Boggs*, 48 Pa. St. 524, reported *sub nom. Glenn* v. *Cuttle*, 2 Grant Cas. 273. The latter was the case of an attorney in fact; but, as observed by the judge delivering the opinion, there is "no adequate ground for a distinction between attorneys in fact and attorneys at law. Diligence and skill in the collection, and promptness and fidelity in paying over moneys, is required of both. It is reasonable, therefore, that they should have the same measure of protection from the statute of limitations." And it was there held, in an unusually well-reasoned opinion, that where an attorney collects money for his client, and uses no fraud or falsehood to him in relation to it, the statute commences to run from the time of the collection. The case was approved and applied in favor of an attorney at law in *Fleming* v. *Culbert*, 46 Pa. St. 498, where it is said that the previous case was a carefully considered one, and had not been questioned in the ten years that had elapsed since it was considered.

The holding that the statute does not begin to run until the attorney has given notice to his client of the collection of the money, because such is his duty, would seem to misconceive the reason and policy of the statute of limitations. It might with as much propriety be said that he could have protected himself by paying over the money, because that was as much his duty as to give notice of its receipt. The unreasonableness of the rule is not in any inconvenience that might attend compliance with it in the first instance, but in overlooking the difficulty that may be encountered, after the lapse of a great number of years, of proving that the notice was in fact given. This might be as difficult as to prove payment itself, if not more so. The policy of the statute is based upon the evanescent character of all testimony, and the consequent difficulty of making a defense to any claim, after the lapse of a number of years.

There is no averment in the petition of any misrepresentation or concealment of the collection of the money by the testator of the defendant; and it is well settled that where a

plaintiff relies upon such facts to aid his case as against the statute, and it appears, from the face of the petition, that it would be otherwise barred, the facts constituting the fraud and the time of its discovery must be averred in the petition, or it will be open to a demurrer: Wood on Limitations, 590; *Combs* v. *Watson*, 32 Ohio St. 228, and cases cited at 235; *Wood* v. *Carpenter*, 101 U. S. 135, and cases cited. It is said by Justice Swayne, in the latter case, that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

Judgment affirmed.

LIMITATION OF ACTIONS — FRAUD. — As to the effect of fraud upon the operation of the statute of limitations: *Jacobs* v. *Snyder*, 76 Iowa, 522; 14 Am. St. Rep. 235, and particularly cases cited in note 237; *Hawley* v. *Page*, 77 Iowa, 239; 14 Am. St. Rep. 275, and note.

LIMITATION OF ACTIONS. — One who claims a suspension of the operation of the statute of limitations because of the fraud of another must affirmatively allege the facts constituting the fraud and its discovery: *Humphrey* v. *Carpenter*, 39 Minn. 115.

ATTORNEY AND CLIENT — LIMITATION OF ACTIONS. — The statute of limitations does not run against a client until he discovers his cause of action arising from the conversion by his attorney of moneys belonging to the client: *Wilder* v. *Secor*, 72 Iowa, 161; 2 Am. St. Rep. 236, and cases in note 238.

POPE *v.* POLLOCK.

[46 OHIO STATE, 367.]

MALICIOUS PROSECUTION OF CIVIL SUIT IS ACTIONABLE WHEN. — The prosecution, maliciously and without probable cause, of a suit in forcible entry and detainer, which results in a verdict for the defendant, affords ground for an action in the nature of a suit for malicious prosecution.

ACTION to recover damages for the prosecution, maliciously and without probable cause, of two suits in forcible entry and detainer, by the defendant. Both suits terminated in a verdict for the plaintiff herein of not guilty. The plaintiff alleged that by reason of the prosecution of those suits he was greatly harassed and annoyed, was much worried and troubled in mind, was injured in reputation among his neighbors, and was caused great inconvenience and much loss of time, and was put to considerable money outlay in defending said suits. The court of common pleas sustained a general demurrer to the petition, and the circuit court affirmed that judgment. This proceeding is prosecuted to reverse these judgments.

William H. Pope, for the plaintiff in error.

John A. Shank, for the defendant in error.

SPEAR, J. Will the prosecution of a suit in forcible entry and detainer, which results in a verdict for the defendant, where the same is prosecuted maliciously and without probable cause, afford ground for an action in the nature of a suit for malicious prosecution, is the question in this case.

The more common causes for actions for malicious prosecution are groundless and malicious prosecutions of criminal charges. But that actions of this kind can be maintained where there has been an unjustifiable and malicious seizure of the property of the complaining party, as well as of the person, there is no question. Whether or not such an action may be maintained where there has been no deprivation of liberty, or of the possession, use, or enjoyment of property, has been the subject of much discussion, and of contrary holdings.

It appears that in England, by the common law, prior to the statute of Marlbridge, 52 Henry III. (1259), actions of this character were allowed, but since the passage of that statute, which gave the successful defendant judgment for costs against the plaintiff, the right to maintain such actions has been uniformly denied; it being held that if one prosecutes an ordinary civil action against another maliciously and without reasonable or probable cause an action for the resulting damage is not maintainable. So, too, in this country, many decisions of like tenor have been made. The courts have said that courts of law are open to every citizen, and that the costs which the defendant gets are a compensation for the wrong. If every suit may be retried on an allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first; and that if a defendant ought to have damages upon a false claim, then the plaintiff ought to have damages on a false plea, which would make litigation interminable: *Beauchamp* v. *Troft*, Keilw. 26; Fitzherbert's New Natura Brevium, 429; 1 Bac. Abr. 141; *Savil* v. *Roberts*, 1 Salk. 14; Bull. N. P. 11; *Parker* v. *Langley*, Gilb. 163; *Goslin* v. *Wilcock*, 2 Wils. 305; 1 Am. Lead. Cas. 261, note; Cooley on Torts, 189; Townshend on Slander and Libel, sec. 410; *Taylor* v. *Wilson*, 1 N. J. L. 362; *Woodmansie* v. *Logan*, 2 Id. 68; *Kramer* v. *Stock*, 10 Watts, 115; *Thomas* v. *Rouse*, 2 Brev. 75; *Ray* v. *Law*, 1 Pet.

C. C. 207; *Potts* v. *Imlay*, 4 N. J. L. 330; 7 Am. Dec. 603; *McNamee* v. *Minke*, 49 Md. 122; *Muldoon* v. *Rickey*, 103 Pa. St. 110; 49 Am. Rep. 117; *Wetmore* v. *Mellinger*, 64 Iowa, 751; 52 Am. Rep. 465; *Bitz* v. *Meyer*, 40 N. J. L. 252; 29 Am. Rep. 233; *Mayer* v. *Walter*, 64 Pa. St. 283.

Where such suits have been maintained, the right has been placed upon the ground that taxable costs, including, as in most states, but the fees of witnesses and officers of the court, afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit, and no remedy at all to repair the injury received. It is upon this principle, in part, that actions have even been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. Where an action is brought and prosecuted maliciously, and without probable cause, it is an abuse of legal process, and the plaintiff asserts no claim in respect to which he has any right to invoke the aid of the law. It is a wrong to disturb one's property or peace; and to prosecute one maliciously, and without probable cause, is to do that person a wrong. The common law declares that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character. When the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of defendant's damage, and the defendant but stands upon his legal rights when he calls upon the plaintiff to prove his case to the satisfaction of judge and jury: *Vanduzer* v. *Linderman*, 10 Johns. 106; *Pangburn* v. *Bull*, 1 Wend. 345; *Whipple* v. *Fuller*, 11 Conn. 582; 29 Am. Dec. 330; *Closson* v. *Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Marbourgh* v. *Smith*, 11 Kan. 554; Bigelow on Torts, 2d ed., 71; *Smith* v. *Smith*, 56 How. Pr. 316; *Bump* v. *Betts*, 19 Wend. 421; *Woods* v. *Finnell*, 13 Ky. 628; *Hoyt* v. *Macon*, 2 Col. 113; *Payne* v. *Donegan*, 9 Brad. App. 566; *McCardle* v. *McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Juchter* v. *Boehm*, 67 Ga. 534; *Lawrence* v. *Hagerman*, 56 Ill. 68; 8 Am. Rep. 674; *Atwood* v. *Marger*, Style, 378; see also an able review of the subject by John D. Lawson, Esq., of the St. Louis bar, 21 Am. Law Reg. 281.

There seems, as will appear by reference to these citations, abundant authority in other states of the Union to support the proposition that a suit may be maintained for damages arising from the prosecution of an ordinary civil action, when the

same is done maliciously, and without probable cause, but without disturbance to person or property. The precise question has not been made in Ohio, though in two cases *Tomlinson* v. *Warner*, 9 Ohio, 104, and *Fortman* v. *Rottier*, 8 Ohio St. 548, 72 Am. Dec. 606, this court has held that an action may be maintained for maliciously, and without probable cause, suing out and levying a writ of attachment. So when one has been wrongfully deprived of the use of his land by the prosecution, maliciously, and without probable cause, of an injunction proceeding, the court held (*Newark Coal Co.* v. *Upson*, 40 Ohio St. 17) that an action for malicious prosecution will lie. The language of the opinion, page 25, is: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment of property of value."

It will be noted that where damages for the prosecution, maliciously and without probable cause, of an ordinary civil action, are refused, one of the principal reasons given is, that the allowance of taxed costs is regarded sufficient punishment to the plaintiff for prosecuting, and recompense to the defendant for defending, such an action. In England, the taxed costs which may be awarded to a successful defendant include not only fees of court officers and witnesses, but attorney's charges for preparing the case for trial and the *honorarium* of the barrister who tries it, and, in a number of American states, a like taxation of costs prevails. But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred; for in cases where damages may be recovered for malicious injury, fees of counsel, as well as court costs, are included in compensatory, and not punitive, damages. The reason for the rule having failed, there is much ground for saying that the rule itself fails.

But there is no necessity in the present case for a determination of the question whether or not an action will lie for the malicious prosecution of an ordinary civil action, without prob-

able cause, where there is no arrest or seizure; for the petition of the plaintiff makes a different case.

In many of its aspects, an action in forcible entry and detainer is an extraordinary proceeding. It is summary in its character, and may become, when prosecuted wrongfully, excessively annoying and harassing. Having given three days' notice in writing to leave the premises, the plaintiff may commence his action by filing a complaint with a justice of the peace, and in three days more the trial may take place: See R. S., secs. 6599 et seq. The complaint need not be sworn to. If a continuance is asked by defendant for more than eight days, security for payment of rent is required. The action may involve the possession by a defendant of a home for himself and a dependent family. A failure to answer or unsuccessful defense may result in immediate and forcible ouster, and this without reference to the condition of the family, or the weather, or other surrounding circumstances. No appeal is allowed, nor is one action a bar to subsequent actions. The contingency of preparing a bill of exceptions must be anticipated, and counsel procured for that; else a review of erroneous holdings cannot be had. Error can be prosecuted only by leave of a judge, and such proceeding raises questions relating to competency of evidence only, and not questions touching the weight or sufficiency of the evidence. The justice is not even bound to sign a bill where the objection is only that the judgment is not sustained by sufficient evidence. If petition in error is allowed to be filed, the party must be ready with security, if exacted, to stay execution of the judgment against him.

Then, too, the plaintiff may select from several concurrent jurisdictions within the county. He may commence his action, if he so desire, in the township farthest removed from the residence of the defendant, or the one most inaccessible, thus requiring, it may be, his adversary to travel long distances, and to transport his witnesses at large expense. Failing in one action thus brought, he may continue prosecutions until his pocket-book, or his malice, or both, become exhausted. Plainly, in the hands of an unscrupulous prosecutor possessed of abundant means, this kind of action may become grievously oppressive; and it is idle to say that the small bill of costs before a justice is either a sufficient punishment to inflict upon a malicious prosecutor, or constitutes any recompense to a wronged defendant. The statute gives to such plaintiff the

right to resort to his action as often as he may choose, and to bring it before any justice within the county; but this implies no right to prosecute maliciously and without probable cause. A groundless action prosecuted with malice is never justifiable, and a wrong suffered by such prosecution in forcible entry and detainer should not be without remedy.

Nor is there force in the objection, as applied to this case, that intolerable evils would arise from a multiplicity of suits thus encouraged. The law-making power has seen fit to provide by this statute that a judgment shall not be a bar to any after action. We have, in this provision, legislative declaration to the effect that evils may not be expected to follow repeated trials of issues under this statute. In consonance with this policy, it may be reasonable to conclude that, if repeated actions to determine the right to possession will not work intolerable evils, a review of the facts by a suit for malicious prosecution will not have that effect. At all events, the right to so review will naturally tend to check any evils that might flow from a misuse of the statutory right to repeated trials.

Judgment reversed.

MALICIOUS PROSECUTION. — The malicious prosecution of a civil suit, without probable cause, is actionable: *Brand* v. *Hinchman*, 68 Mich. 590; 13 Am. St. Rep. 362.

HUFF *v.* AUSTIN.

[46 OHIO STATE, 386.]

EXPLOSION OF STEAM-BOILER NOT PRIMA FACIE EVIDENCE OF NEGLIGENCE WHEN. — Where an employee of the vendor of a saw-mill, while assisting in setting up and getting the mill in order, is injured by the explosion of the steam-boiler in the mill, the mere happening of the accident does not raise a *prima facie* presumption of negligence on the part of the owner of the mill in managing and conducting the same.

ACTION for personal injuries. The opinion states the case.

Kennedy and Steen, and Butterworth and Crosley, for the plaintiff in error.

E. J. Howenstein, and West, Brown, and West, for the defendants in error.

DICKMAN, J. On the twentieth day of January, A. D. 1882, Chauncy F. H. Huff, the plaintiff, was engaged as an employee of Fay & Co., in locating and getting in working order on the

premises of the defendants, Josiah Austin and James Morrison, a saw-mill which Austin had recently purchased of Fay & Co., the latter to furnish a man to help in setting up and getting the same in working condition. While engaged as such employee of Fay & Co., the plaintiff was injured in his person by an explosion of the steam-boiler owned and used by the defendants to run the saw-mill. The plaintiff brought his action in the court of common pleas, alleging that the explosion was caused by the defectiveness of the boiler and engine, and the carelessness of the defendants in managing and conducting the same, and claimed damages for the injuries he had suffered. A judgment was rendered in favor of the plaintiff, which judgment was reversed by the circuit court, and the cause remanded for error of the court of common pleas in instructing the jury as follows:—

"If the plaintiff was without fault on his part, and was injured by the explosion of a boiler operated by the defendants, or their servant or agent, the mere fact of such explosion raises a presumption of negligence on the part of the defendants. This presumption is only *prima facie*, however, and not conclusive; that is, the plaintiff will be entitled to recover on such presumption, unless the defendants, by a preponderance of evidence, show that they exercised ordinary care and prudence; that is, such care and prudence as is ordinarily exercised by men of ordinary prudence under like circumstances."

The defendants had a right to place the steam-boiler on their premises. Used as it was to run the saw-mill, it was in no sense a nuisance. As an agent in the varied departments of industry, the steam-engine has become a necessity in modern life. But though placed on one's own premises, the owner of a steam-engine and boiler will be held responsible for his negligence if he so operates the same as to injure one who comes lawfully upon the premises by invitation or permission. Though doing a lawful act upon his own premises, he will be liable for injurious consequences that may result from it to another, if it was so done as to constitute actionable negligence. In such case there is a proper application of the rule that one should enjoy his own property in such manner as not to injure that of another person.

But the existence of negligence is an affirmative fact, and the presumption is, until the contrary appears, that every man will perform his duty. There is a general disposition among

men to preserve their property, and avoid difficulty and danger, and escape the liability to which the want of care and diligence would naturally subject them. Ordinarily, these motives will secure on the part of the proprietor of machinery impelled by steam, and the engineer in charge of such machinery, that degree of skill and attention which the safety of the public demands. In view of such presumption it is the general doctrine, as sustained by a great weight of authority, that when negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant; that he must give some affirmative evidence from which there may be a logical inference of negligence, and the mere happening of an accident will not be sufficient evidence of negligence to be left to the jury: See Wharton on Negligence, 2d ed., sec. 421, and cases there cited.

It is contended, however, that the defendants are responsible in the first instance for the immediate consequences of the bursting of the steam-boiler in use on their premises, irrespective of any further question as to negligence or want of skill on their part, and that the accident, in the absence of explanation, is, of itself, evidence of negligence. It is urged that, where the instrument or machinery is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. But instances are not unfrequent of steam-boiler explosions where there has been no want of ordinary care and skill in their management, and even where there has been the greatest care; and explosions of steam-boilers have happened of so mysterious a character that they could not, with confidence, be assigned to any known cause. Considering the extent to which the agency of steam is now so necessarily and usefully employed, we are not prepared to hold that the owner of a steam-boiler used on his premises shall be deemed virtually an insurer against all damage and injury to person or property resulting from an explosion, unless, in the event of an accident, he assume the burden of proving that there has been no fault or negligence on the part of himself or his agents.

In the early case of *Spencer* v. *Campbell*, 9 Watts & S. 32, a man drove a horse to defendant's steam grist-mill to obtain a grist, and was thus lawfully upon defendant's premises, and

was as much entitled to protection there as if he had been upon his own premises. While there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse. It was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill, and diligence.

In *Losee* v. *Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, there was an extended review of authorities. The action was brought to recover damages occasioned by the bursting of a steam-boiler, while the same was owned and being used by the Saratoga Paper Company, one of the defendants, at their mill. The boiler, by means of its explosion, was projected and thrown upon the plaintiff's premises, and through several of his buildings, thereby injuring and damaging the same, and destroying personal property therein. The case sustains the doctrine that the owner of a steam-boiler, who operates and uses the same in carrying on his business upon his own premises in such a manner that it is not a nuisance, is not liable for damages done to the property of his neighbor by an explosion of such boiler, without affirmative proof of negligence on the owner's part.

Earl, C., in commenting upon *Spencer* v. *Campbell*, *supra*, says: "I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill, or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident." See also *Marshall* v. *Wellwood*, 38 N. J. L. 339; 20 Am. Rep. 394.

Walker v. *Chicago etc. R'y Co.*, 71 Iowa, 658, is a comparatively recent case, illustrative of the principle that the accident itself did not furnish a *prima facie* presumption of negligence against the defendant. A car of dynamite standing in the yard of the defendant railroad company awaiting the orders of its owner took fire and exploded. The plaintiff sued for damages for the consequent injury to certain buildings, averring

that the dynamite was not properly protected, that the fire had caught from a passing engine, and that the car was negligently permitted to stand in an improper place. At the time of the fire the car stood on the outer track at the south side of the yard, and the wind was blowing from the south. There was no evidence that the fire had caught from passing engines, or that they were defective in their machinery for protection against fire escaping therefrom. There was no evidence that the dynamite was not properly protected, nor that the damage would have been less if the car had been standing at any other place in the yard. It was held that the burden of proof was on the plaintiff to show that the car stood in an improper place, and that there was no evidence of negligence to go to the jury. The court say: "The relation between the parties to the action is not such that the law presumes negligence in the defendant by the mere fact that the plaintiff's property was injured. The burden was on the plaintiff to show that the place where the car was stored was an improper place. All the light the jury had on this subject was, that the car exploded, and the plaintiff's property was injured."

Whether the defendants can be held liable for the injury caused by the explosion of the boiler owned and used by them on their own premises, without affirmative proof of negligence beyond the mere fact of the explosion, is not to be determined by the rule of negligence governing common carriers of passengers and goods. The carrier of goods is an insurer, unless his extraordinary responsibility is limited by special contract. And the carrier of passengers, while not an insurer of their safety, is bound to the observance of the utmost care and diligence for their safety, and is responsible for any, even the slightest, neglect. "When carriers undertake to carry persons by the agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence, in such cases, may well deserve the epithet of 'gross'": Grier, J., in *Philadelphia etc. R. R. Co.* v. *Derby*, 14 How. 486. By reason of the reliance for personal safety of passengers upon the carrier, and of the high degree of care and diligence which the law requires towards those with whom there is a relation of trust and confidence, courts have held that the fact of injury having been suffered by any one while upon a railroad company's train as a passenger should be regarded as *prima facie* evidence of the liability: *Iron R. R. Co.* v. *Mowery*, 36 Ohio St. 418; 38 Am. Rep. 597. But as to the

presumptive liability even of common carriers for injuries caused by boiler explosions, Congress, to remove doubt and uncertainty as to such liability, deemed it necessary to provide by section 13 of the act of July 7, 1838, 5 United States Statutes at Large, 306, "that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, the fact of such bursting shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment." The provision in the act of Congress was subsequently repealed; but whether in full force or not, there was no such relation between the plaintiff and defendants herein as exists between common carriers and passengers; and reported cases, determining the liability of common carriers for injuries to passengers under their care, furnish no appropriate rule of decision in the case at bar.

Judgment affirmed.

NEGLIGENCE. — The burden of proof is upon the plaintiff in actions for negligence; the law will not presume it for him: *McCully* v. *Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; note to *Blanchard* v. *Lake Shore etc. R'y Co.*, 9 Am. St. Rep. 637, 638.

HARPOLD *v.* STOBART.

[46 OHIO STATE, 397.]

APPEAL CARRIES UP CASE AS TO PARTY NOT APPEALING, WHEN. — If, in a suit by creditors of an insolvent corporation to enforce the statutory liability of its stockholders, one of the defendants pleads that, before the insolvency of the corporation, he, in good faith, sold his shares of stock to another of the defendants, who is solvent, and prays that whatever sum is found to be due as respects the shares so sold may be adjudged against such other defendant, and issue is joined by reply, and a judgment is rendered in the common pleas, from which the vendor appeals to the circuit court, the vendee is a party necessary to the working out of the equities, and such appeal carries up the case as to him, whether he appeals in his own right or not.

TRANSFERS OF SHARES OF STOCK, TO BE VALID, MUST BE MADE ON STOCK-BOOK of the corporation, and the creditors of the corporation have the right to rely upon that book as showing who the stockholders are, and the amount of stock held by each. Where, therefore, a vendor of stock causes the secretary of a corporation to enter the transfer of stock sold by him to be made in a book other than the stock-book, with the understanding that such transfer will be made in the stock-book, but no such

transfer is made, and at the time of the accruing of the debts of the corporation, and at the time of the trial, the vendor appears, from the stock-book, to be the owner of the shares, such entry is not sufficient to relieve the vendor from liability to the creditors of the corporation, notwithstanding the fact that he sold in good faith and for value, and believed that he had done everything necessary to effect a transfer of the stock, and notwithstanding the further fact that the corporation thereafter treated the purchaser as the owner of the stock sold.

LIABILITY OF STOCKHOLDERS OF CORPORATION, EXTENT OF, AND WHEN IT ATTACHES. — A stockholder of a corporation, who has in good faith sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation for such portion only of the debts existing while he held the stock, and remaining due (not in excess of the stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be determined at the time judgment is rendered.

ACTION brought by the creditors of the Riverside Salt Company, an insolvent corporation, to enforce the statutory liability of the stockholders. Several of the defendants were not stockholders when the corporation became insolvent, but had been before that time, and they were sued because they had assigned to persons who were insolvent. W. A. Roberts, who was a creditor of the company, and for a time a stockholder, sold and transferred his stock to R. R. Hudson, on the 29th of May, 1875. The plaintiffs in error, except Roberts, appealed the case from the common pleas to the circuit court, where judgments were rendered against the plaintiffs in error, to reverse which this proceeding is prosecuted. When judgment was rendered against Roberts in the common pleas, he paid the sum of four hundred dollars. Roberts claimed that the judgment of the circuit court was erroneous, because he had not appealed to that court. Harpold claimed that the circuit court erred in holding him as a stockholder, because he had transferred his stock to Roberts. All the plaintiffs in error further claimed that the judgments rendered were excessive. Other facts are stated in the opinion.

Russell and Russell, for the plaintiffs in error.

W. H. Lasley and J. U. Myers, for the defendant in error.

SPEAR, J. 1. Was W. A. Roberts a party in the circuit court?

Issue was made by the answer of Harpold, and the reply, as to his alleged transfer to Roberts, and as to his right to have all assessments against the shares of stock by him sold to

Roberts, made against that party. Hence Roberts was a party necessary to the working out of the equities of Harpold, and that fact gave Harpold the right to appeal the whole case in so far as it affected him, and that appeal carried Roberts into the circuit court, whether his presence in the case as a creditor had a like effect or not. There was no error in overruling Roberts's motion to dismiss the appeal. But the appeal vacated the judgment rendered against Roberts in the common pleas, and his payment of four hundred dollars, made on that judgment, should have been credited to him in the circuit court, and the refusal to so credit it, we think, was error.

2. Did the circuit court err in its judgment against Peter Harpold?

The controversy arises as to thirty shares of stock, which, on May 12, 1873, he sold in good faith and for value to W. A. Roberts; and he claims that as to these he should be held only as a guarantor for Roberts, and that such liability should be confined to a proportional liability for debts existing at the time of the sale. The sale was admitted; but it was claimed by the creditors that there was no transfer of the stock on the books of the company, and hence that Harpold continued liable to creditors as though he had owned the stock at the commencement of the action. The findings of the circuit court show that the transfer stock-book of the company was Journal A; that no transfer of this stock was made on that book, though a transfer was, at the time of the sale, entered by the secretary in a small book present in the office of the company, and it was then understood that the secretary would make the transfer in another book then at his house. The president and directors of the company were present, and knew of the transaction. Harpold was a director at the time, and he did all that he supposed necessary to effect the transfer, and the corporation thereafter treated Roberts as the owner of the stock. Two years later, there was an entry on Journal A of the transfer of eighty shares from Roberts to one R. R. Hudson, which included the thirty shares purchased by Roberts from Harpold. At the time of the trial, Harpold still appeared by Ledger A and Journal A to be the owner of thirty shares of stock.

The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are, and the amount of stock held by each, and they are pre-

sumed to have relied upon the record so found in this case. While it is not necessary that a book of any special kind be adopted for that purpose, yet when one is selected and used, that becomes the stock-book, and transfers, to be valid, must be made upon that. The object to be accomplished by the keeping of such a book requires reasonable certainty as to its identity. Where the book so selected and used by the company shows that the party is the owner of shares of stock, he is estopped, as between himself and creditors, to contradict the record, provided the entry was placed in the stock-book originally by his consent. And where the name of an actual stockholder appears upon that book as owning a given number of shares, the entry is presumed to have been made with his consent; at least, this is so where it was correct when made, and, as between him and creditors of the corporation, he is estopped to contradict the record or deny ownership of the shares: R. S., sec. 3259; Lowell on Transfer of Stock, secs. 82, 107, 191, 203; Thompson's Liability of Stockholders, sec. 217; *Ex parte Brown*, 19 Beav. 97; *Stanley* v. *Stanley*, 26 Me. 191.

The circuit court treated Harpold as the owner of these shares, as between him and creditors, and this, we think, was correct. But, as between Harpold and Roberts, the former was entitled to a judgment against the latter.

3. The finding as to Daniel Bibbee presents the facts upon which may be determined the further question in the case. He was the owner of twenty shares of stock, the par value of which was two thousand dollars. On the thirty-first day of May, 1875, he sold this stock, in good faith and for value, to one R. R. Hudson, and the same was on that day transferred to the latter on the books of the company. The company continued to do business until the year 1878, when it failed, many new debts having accrued in the mean time. Hudson became insolvent, and was so at the time the cause was tried. At that time the liabilities of the corporation reached $43,791.05, a sum in excess of the face value of all the stock held by solvent stockholders, as well those who had assigned their stock as those who were holders at the commencement of the suit. During the life of the corporation frequent changes occurred in the ownership of portions of the stock, and debts against the corporation accrued at various times during that period.

In its decree the court divided the indebtedness into series,

and made assessments upon stockholders to meet each class of debts, with a finding as to what stockholders were solvent, and the amount of stock held by each at the date fixed for each assessment, rendering judgments accordingly. Those who owned stock at the commencement of the action, and were solvent, were assessed the full amount of their statutory liability, and that liability was thus exhausted. By this finding it appears that between July 11, 1873, and January 1, 1875, there existed debts still unpaid to the amount of $4,152.50, upon which assessment was made against Bibbee of $519.25. Between June 15, 1870, and July 11, 1873, there existed debts still unpaid to the amount of $13,148, upon which he was assessed $1,391, and prior to June 15, 1870, there existed debts to the amount of $926.90, upon which he assessed $80, the whole amounting to a sum practically equal to the amount of his stock. In making these assessments the court commenced with the class of stockholders who held stock at the date of the failure of the company, and assessed each solvent stockholder to the full amount of his liability in respect of all the debts then due from the corporation. The amount so procured not proving sufficient to pay the obligations, the court then, proceeding to the class last in order of assignment of stock, assessed the solvent assignors of the present insolvent stockholders, in the amount of their liability in respect of the debts contracted prior to the transfer of their stock to their insolvent assignees, and so proceeded until all liability on stock was exhausted.

The effect of this rule, as to each solvent assignor of stock to an insolvent assignee, was to make him liable, not simply to a proportionate amount of the indebtedness which existed while he was a stockholder equal to the ratio which his proportion of the capital stock bore to the entire stock held by solvent stockholders, but to an amount equal to the full amount of his stock.

It is claimed for Bibbee that he should have been assessed but $956.64, in all, and that the court erred in omitting to include in the class of stockholders who were liable with him those who were holders of stock when the suit was commenced, but who, by the decree, were left out because their liability had already been exhausted. This claim presents the question to be determined, which is: Is this party to be assessed in a class which includes only those who were stockholders at the time he was such and are solvent, or should such class

include also those who continued to be stockholders, and so became liable in respect of after-accruing debts?

We first inquire, What liability was created? What right of contribution, if any, attended it? Is the liability which may be enforced to be measured by the extent of liability as of the time it attached, or may it be enlarged by reason of a change in the condition of the corporation, brought about by after-accruing debts? And is the right of contribution to be impaired by reason of like causes?

We are not materially aided in making answer, either by text-books, or by decisions of courts outside of our own.

The constitutional provision is: "Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." And the statute is: "All stockholders . . . . shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company." It will be noted that neither provision gives a rule for determining who are stockholders, nor for ascertaining whether or not all may be treated as stockholders for some purposes, and not for others. But such questions are left for determination by the courts in giving construction to the statute, as cases may arise. In construing these provisions, the holdings in this state are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted or the liability incurred by the corporation, and that such liability is not discharged by the subsequent assignment or transfer of the stock, but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock. This right against the stockholders is intended for the common and equal benefit of all the creditors. As between the stockholders and the creditors, each stockholder is liable severally to all the creditors; but, as between stockholders, there is a proportional liability by all stockholders, and right of contribution, which grows out of the organic relation existing between them, and, as between them, each stockholder is bound to pay in proportion to his stock. The liability is not a primary fund or resource for the payment of the debts of the company, but is

collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process: *Wright* v. *McCormack*, 17 Ohio St. 86; *Umstead* v. *Buskirk*, 17 Id. 113; *Brown* v. *Hitchcock*, 36 Id. 667; *Wheeler* v. *Faurot*, 37 Id. 26; *Bullock* v. *Kilgour*, 39 Id. 543; *Mason* v. *Alexander*, 44 Id. 318.

Of the foregoing, there should be emphasized three important conclusions bearing upon the question under consideration, viz.: 1. The liability of the stockholder is collateral to that of the principal debtor, the corporation; 2. This liability attaches at the time the debt against the corporation is created or liability incurred; and 3. Each stockholder sought to be so made liable has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders within the jurisdiction, and solvent, who stand in the same relation to the debts with himself, shall be brought in, and be held to their proportional liability in common with him.

When it has been determined that the liability of the stockholder is collateral, and not original, his right to ask for a marshaling of other like securities arises. So, too, when it has been determined that the liability as to debts arises at the time they are incurred, it clearly follows that such liability is confined to debts which exist during the time the stock is owned. It follows, with equal certainty, that no mode of assessment should be adopted which enlarges the liability of the stockholder in the case we are considering, so as to make him liable, directly or indirectly, for debts contracted by the corporation after he has ceased to be a stockholder. And when it has been ascertained that he has the right of contribution, as between himself and his fellow stockholders who stand in the same relation with himself to the debts he is sought to be held for, it follows, with like certainty, that no rule of assessment which curtails that right is equitable or just. This liability has already attached, and it is in respect of debts existing at the time he assigns, and for nothing else. His right of contribution against his fellow stockholders, to require them to respond to their proportional share of the same burden, is enforceable in the same action; and this right is not inferior to that of the creditor to enforce his claim. They go together. It is equally plain that if any of the stockholders who are alike liable with him are assessed

so that their liability is exhausted in the payment, in whole or in part, of debts created after he has assigned his stock, then he is indirectly made to respond to debts of that character, and his right to insist upon proportionate contribution is, in like manner, impaired. As we have already found, he is, in a sense, a surety for the corporation. That is, his liability is secondary, and not primary. Resort must first be had to the corporation before he can be held.

In Michigan, under a statute not dissimilar to ours, as construed in *Wright* v. *McCormack*, *supra*, the supreme court (*Hanson* v. *Donkersley*, 37 Mich. 184) held a stockholder to be a surety, and that his liability is discharged by the extension of time by the creditor; and there are other authorities to the same effect. Whether or not the law in Ohio goes to that length, we need not inquire. It is enough to know that his obligation is collateral and secondary, and that he has the right to call upon his co-stockholders to bear their proportion of the common liability. Is it equitable to impair that right? True, the liability created by statute is for the benefit of creditors, but it does not follow that the creditor's interest is the only one the court should guard. All laws for the collection of debts are in the interest of creditors, but the duty of giving to the creditor the full benefit of such statutes does not warrant forgetfulness of the rights of the debtor. And in this case no reason exists for enforcing the right of the creditor given by the statute, and at the same time ignoring the limitation placed upon that right by the construction of this court given to the statute.

After the stockholder ceases to be such, he has no voice in the management of the corporation, and no share in the profits that may thereafter be made. The creditor continues, or may continue, to deal with the corporation, and in doing so, may delay indefinitely the collection of his debt, even if he may not, by a new contract, extend its payment without consent or knowledge on the part of the stockholder who has assigned, and thus continue a contingent liability against the latter which he is powerless to terminate. Under such circumstances, it does not seem inequitable to place upon the creditor, rather than upon the former stockholder, the risks incident to such delays as affected by the incurring of new debts.

We are of opinion that a stockholder who has in good faith sold and assigned his stock to one who becomes insolvent is liable to creditors of the corporation for such portion only of

the debts existing while he held the stock, and remaining due (not in excess of the amount of stock assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders liable in respect of the same debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered.

In this view, the mode of assessment adopted by the circuit court was not an equitable one, and the judgments against the plaintiffs in error Roberts, Williamson, executor of Moses E. Sayre, and Daniel Bibbee, should be modified in conformity with the conclusions herein stated.

The costs in this court may be taxed, one half to plaintiffs in error, and one half to defendants in error.

APPELLATE PROCEDURE. —In suits where judgments as an entirety are rendered against several defendants, errors committed as against any one defendant are prejudicial to all, and an appeal by one takes up the case for all: *City of St. Louis* v. *Lanigan*, 97 Mo. 176; but in the case of a judgment not as an entirety, an appeal taken by one defendant will not authorize a reversa- for error committed, prejudicial only to another defendant, who has failed to appeal: Id.; *Heil* v. *Heil*, 40 Kan. 69; *Ahern* v. *McGeary*, 79 Cal. 44; *Duesterberg* v. *Swartzel*, 115 Ind. 180; nor will a joint assignment of error by several defendants present to the court a ruling of the lower court erroneous only as to one of them: *Sparklin* v. *St. James Church*, 119 Id. 535. Compare *Lovejoy* v. *Irelan*, 17 Md. 525; 79 Am. Dec. 667, and note.

TRANSFERS OF SHARES OF STOCK, to be valid, must ordinarily be entered upon the books of the corporation: *Weston* v. *Bear River etc. Co.*, 5 Cal. 186; 63 Am. Dec. 117, and note. But in *Thurber* v. *Crump*, 86 Ky. 408, it was held that transfers of stock in corporations are valid both between the parties themselves and as to creditors, even though not entered upon the corporation books. And in *Graves* v. *Mining Co.*, 81 Cal. 304, certificates of stock indorsed in blank were held to pass title by mere delivery without further indorsement or transfer upon the corporation books. While under the Alabama statute a transfer of stock not recorded upon the corporation books within fifteen days thereafter is void as to *bona fide* creditors, or subsequent purchasers without notice: *Berney Nat. Bank* v. *Pinckard*, 87 Ala. 577.

LIABILITY OF STOCKHOLDERS OF A CORPORATION, THE EXTENT OF, AND WHEN ATTACHES: See extended monographic note to *Thompson* v. *Reno Sav. Bank*, 3 Am. St. Rep. 806–872; *Schalucky* v. *Field*, 124 Ill. 617; 7 Am. St. Rep. 399; *Jackson* v. *Meek*, 87 Tenn. 69; 10 Am. St. Rep. 620. The liability of stockholders in a private corporation is governed by the law of the state by which the corporate charter is granted: *Morris* v. *Glenn*, 87 Ala. 628. Stockholders cannot exempt themselves from personal liability to the extent of their stock, by organizing as a "manufacturing corporation," when it is evident that but a trifling part of the corporation's business is manufacturing: *Mohr* v. *Minnesota Elevator Co.*, 40 Minn. 343. Under the Virginia statute a transferrer of stock in a private corporation, not fully paid for, is equally liable with the transferee for such unpaid stock: *Morris* v. *Glenn*, 87 Ala. 628.

MANDEL *v.* MCCLAVE.

[46 OHIO STATE, 407.]

CONTINGENT RIGHT OF DOWER IS PROPERTY HAVING SUBSTANTIAL AND ASCERTAINABLE VALUE. — The contingent right of a wife to dower in her husband's lands at his death has a positive and substantial value which can, during his life, be ascertained with reasonable certainty by reference to tables of mortality of recognized authority, aided by evidence as to the state of health and constitutional vigor of the wife and her husband.

WIFE'S CONTINGENT RIGHT OF DOWER IN HER HUSBAND'S LANDS, EXTENT OF. — Where a wife joins with her husband in a mortgage of his lands to secure his debt, such release of her right of dower inures only to the benefit of the mortgagee and his privies, but does not inure to the benefit of subsequent creditors of her husband; and if a judicial sale of the premises be made under judgments in their favor, she will be entitled to have the value of her contingent right of dower in the entire proceeds ascertained, and to have the same paid to her out of the balance left after payment of the mortgage debt, before any part of such balance can be applied to the payment of their judgments.

ACTION to enforce a judgment. The plaintiff in error excepted in one particular to the conclusions of law drawn by the court of common pleas upon the trial, and carried the cause to the circuit court, which affirmed the judgment of the lower court. She thereupon instituted this proceeding to reverse both judgments. Mrs. Mandel joined with her husband in two mortgages on his real estate to secure his debts. The husband subsequently became indebted to John McClave and William H. Lowe, separately, each of whom reduced his debt to judgment. McClave then brought suit to enforce his judgment, making Lowe, the two mortgagees, and Mandel and wife parties. A decree was rendered in this action giving each lien-holder a judgment for the sale of the premises. A sale was made on an order caused to be issued by McClave. The value of the wife's contingent right of dower was found to be $1,203.06, if she was entitled to be endowed of the whole estate, but only $278.95, if she was entitled to be endowed of the equity of redemption only. Lowe's claim was $1,774.70, and Mc Clave's, $1,730.39. The court below held that Mrs. Mandel was only entitled to be endowed of the equity of redemption. Other facts are stated in the opinion.

John M. Cook, for the plaintiff in error.

McClave and Lewis, for the defendants in error.

BRADBURY, J. The husband of plaintiff in error is still living, and therefore, when his lands were sold by the sheriff

and the proceeds thereof distributed by the order of the court of common pleas, she had only a contingent right of dower therein. This right, the court found, was sold and passed to the purchaser at the sheriff's sale. To this finding she took no exception, being apparently satisfied to have her rights determined by the order of distribution.

The proceeds of the sale were $17,600, of which $13,663.37 were consumed in paying the taxes, costs, and mortgage liens, about which no contention arose; there then remained a balance of $3,930.63 to be distributed to the wife and the two judgment creditors. Of this sum she claimed $500, in lieu of a homestead; on this claim the court found in her favor, and the amount was paid to her. The defendant McClave excepted to this finding and order of the court, but did not, so far as the record discloses, bring the question to the attention of the circuit court, nor has he presented the matter to this court for review. He will therefore be regarded as acquiescing in the action of the court below respecting it, and the question will not be further noticed here.

The only ruling of the courts below that we are asked to review is that which limited the right of the wife to dower in the proceeds of the equity of redemption. As the fund is large enough to pay in full Lowe's claim, notwithstanding the wife's claim may be allowed to its full extent, it follows that he is not interested in the question; but as the claim of the wife, to the extent it may be allowed, will be paid out of funds that would otherwise be distributed to McClave, the contention is confined to them.

McClave concedes that the wife is entitled to be endowed of the proceeds of the equity of redemption, while she claims the right to be endowed of the entire proceeds of the land, to be paid, however, out of the proceeds of the equity of redemption. He contends that her release of dower to the mortgagees inures to his benefit; that it was an absolute release of that right in the premises to the extent of the mortgage debt, and that in satisfying the mortgage debts out of the proceeds, her interest in so much of the fund as was required for that purpose should be applied equally with that of her husband.

Her contention, upon the other hand, is, that her contingent interest in the whole premises was pledged, together with the whole interest of the husband therein, for the payment of his debt; that the debt being his, it was primarily chargeable upon his interest, and that his entire interest in the thing

pledged should be applied to pay the debt before resorting to her interest therein.

This precise question is new in this state, and we are to solve it by applying to the facts such settled legal and equitable principles as in their nature are applicable and pertinent thereto.

If the contingent right of a wife to dower in her husband's real estate is recognized by the laws of the state as property, and if her release of it by joining with her husband in a mortgage to secure his debt is not a technical bar, but, instead, only inures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying, in favor of the wife, the equitable rule that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity to prevent the application of this equitable rule; they have no claim that property, which, as between husband and wife, belongs to the wife, shall be taken without her consent, and applied to pay their debts against the husband. The first question, therefore, to be determined is, whether, in this state, the contingent right of a wife to dower in her husband's real estate is property having a substantial and ascertainable value.

To reconcile all the cases, even in Ohio, on the subject of the nature of the wife's contingent right of dower, or respecting the effect of her release of it by joining with her husband in a conveyance of the real estate to which it attaches, would be impossible. In the cases upon the subject in this, or in other states, or in England, almost every shade of opinion can be found. Nowhere is this wide divergence of judicial opinion more clearly set forth than in the dissenting opinion of Judge Johnson in *Black* v. *Kuhlman*, 30 Ohio St. 196, where that able judge reviews the cases in support of the older and more technical rules on the subject. The court, however, took the more liberal, and as we think the more reasonable, view of the question. And there seems to be clearly discernible in the Ohio cases a growing tendency to disregard the older and more technical rules of the earlier cases; and this is especially true of the later cases in this state.

It is an incontestable fact that, in the estimation of the business world, the contingent right of the wife, during the husband's life, to dower in his real estate at his death has a

positive and substantial value, and no acuteness of artificial reasoning, founded on technical rules of law, can persuade a prospective purchaser to the contrary.

This practical view of the matter has been adopted by the later Ohio cases: *Ketchum* v. *Shaw*, 28 Ohio St. 503; *Black* v. *Kuhlman*, 30 Id. 196; *Unger* v. *Leiter*, 32 Id. 210; *Kling* v. *Ballentine*, 40 Id. 391.

In *Black* v. *Kuhlman*, *supra*, the court held, not only that her contingent right of dower was valuable, but that during her husband's life its value could be ascertained with reasonable certainty under tables of mortality, "based on wide and long observations." And furthermore, that its value should be thus ascertained, as against mortgagees in whose mortgages she had not joined, and paid to a subsequent mortgagee to whom, by joining with her husband, she had subsequently released it.

In *Unger* v. *Leiter*, *supra*, the court found the contingent right of the wife to dower to be valuable, and that value capable of ascertainment "by reference to tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband." In addition to these cases, we have statutory recognition of the property of the wife in her contingent right of dower in the real estate of her husband during his life: Ohio Laws, vol. 82, p. 14. This statute directs the probate court to ascertain the value of the wife's contingent dower in the real estate of an insolvent debtor, and directs the same to be paid to her. Thus we have the legislature as well as the courts of the state recognizing this right as tangible property, capable of being ascertained, and in a proper case given to her or to her releasee.

What, then, is the effect of her release of this right by joining with her husband in a mortgage to secure his debt? Does it inure to the benefit of other persons who are strangers to the deed, or is its operation restricted to the grantee and his privies? This latter view we think the more reasonable; it accords more nearly with the probable intention of the parties to the instrument; there is no ground to assert that the mortgagee was contracting for the benefit of any one but himself; there is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that

particular debt; nor is there, in the terms of the instrument itself, any language importing such intent. If, therefore, the instrument has any such effect, it is the result of some technical rule of law giving to the deed of the parties in this respect an operation never, so far as can be gathered from the words of the parties, within their contemplation. Whatever the state of the law may be elsewhere, we think no such technical rule now prevails in Ohio; some of the earlier cases seem to give it support, but the tendency of the later cases is to limit the operation of the release to the mortgagee and his privies.

In *Ketchum* v. *Shaw*, 28 Ohio St. 503, a case involving the right of a wife to dower, we find this language used by Judge Wright (506): "She joined in the conveyance of the land, releasing her dower, not absolutely, but only so far forth as it was necessary to pay the mortgage debt. That done, everything else remains to her."

In *Kitzmiller* v. *Van Renselaer*, 10 Ohio St. 63, it appeared that, after the recovery of a judgment against the husband, he sold his real estate to a third person, the wife joining in the deed by a release of dower. Afterwards, the land was sold under an execution issued on the judgment, whereupon the purchaser ejected the grantee under the deed of the husband and wife. The husband then died, and the wife brought suit for dower against the purchaser at the judicial sale. He sought to defeat her claim for dower by setting up her release to the grantee of the husband; but the court held that the release did not inure to his benefit. On page 64, this language is found: "He cannot make the release available to him as a grant, for he was not a party to the grant; nor is he in privity with the grantees. The release cannot operate in behalf of the defendant below by way of estoppel; for a stranger cannot be bound by nor take advantage of an estoppel." Here the wife had released her right of dower to the grantee of her husband absolutely; no right of redemption reserved as in a mortgage, yet the court hold that the release is wholly inoperative except in favor of the grantee. Cases can be found in Ohio that conflict with this view; but this irreconcilable conflict leaves us to adopt that view which accords most nearly with that presumed intention of the parties which arises from the nature of the transaction, and a rational construction of the language they have used.

It being established that the contingent right of the wife to

dower in her husband's real estate is property, the value of which can be ascertained by the aid of fixed principles, and that her release of it by joining with her husband in a mortgage to secure his debt does not, by reason of any technical rule of law, inure to the benefit of a stranger to the instrument, either by way of grant or estoppel, it remains for the court to determine to what extent equity will protect this right after the real estate has been converted into money, and the fund is before the court for distribution. The undoubted rule is, that, so long as the real estate remains in the husband or his grantee, equity will not interfere in her favor during the life of the husband, but that she must await her husband's death, when her inchoate right will become consummate. When, however, the estate has been sold at a judicial sale, free from her contingent right of dower, whatever right she may have is in the proceeds of the sale, and must be enforced, if at all, by a distribution of the fund.

If the plaintiff in error had been seised of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other, he would be the principal, and she his surety. We think the same principle should be applied to her contingent right of dower. It is property; its value can be ascertained. More than this, it is a favorite of the law: See authorities collected in 5 Am. & Eng. Ency. of Law, 885, note. It is a provision for her support, and when she pledges it for her husband's debt, by joining in a mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has first been exhausted. She is a purchaser. The inception of her right was earlier than that of the creditors; it began with the marriage and seisin of the husband; theirs began when the debt was contracted, but only became a lien from the recovery of the judgment against the husband. This favorite of the law is entitled to protection equal to that accorded to her other property.

We are aware that this question has been decided differently in many of the states, but by courts holding views of the nature of contingent dower, and of the effect of the wife's release thereof, widely different from those adopted in this state in relation thereto, and the decisions are therefore of little or no weight here. One Ohio case—*Bank* v. *Hinton*, 12 Ohio

St. 509 —is not in harmony with our view; but the able judge who wrote the opinion in that case rested the decision respecting this point upon the authority of two New York cases,— *Hawley* v. *Bradford*, 9 Paige, 200, 37 Am. Dec. 390, and *Bell* v. *New York*, 10 Paige, 49,—and entered upon no discussion of the principles necessarily involved therein.

The conclusions reached by the court in these two cases in Paige were legitimately drawn from the doctrine which obtains in New York respecting the nature of the contingent right of the wife to dower, and the effect of a release of it by her, by joining with her husband in deed or mortgage; but they by no means follow from the rules laid down in Ohio cases on the same subject, and therefore those cases cannot be regarded as of sufficient authority to prevent our deducing from the Ohio cases such results as legitimately follow from them.

Whether *Bank* v. *Hinton*, *supra*, resting as it does upon those cases in Paige, has become a rule of property in this state, which we would deem ourselves bound to follow in cases coming within its exact terms, we need not stop now to inquire.

The more recent case of *Kling* v. *Ballentine*, *supra*, is in accord with our decision here. In that case, the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband's life, joined with him in a mortgage of his land to secure his debt, and the court held that, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case, the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund; and the principles that underlie and justify the holding of the court in that case are the same which we apply to the case before us; they are, that the contingent interest of the wife to dower in her husband's real estate is valuable, and that her release of it by joining with him in a mortgage to secure his debt is not a technical bar, and inures only to the mortgagee and those claiming under him.

It follows, therefore, that the judgment of the circuit court and that of the court of common pleas should be modified so as to give the plaintiff in error the value of her contingent right of dower in the entire fund.

DOWER IN MORTGAGED PREMISES. — A wife uniting with her husband in a mortgage of his realty, which is subsequently sold under the mortgage, is only entitled to her dower in the surplus after the mortgage debt has been paid: *Bank of Commerce* v. *Owens*, 31 Md. 320; 1 Am. Rep. 60. Dower is not barred, where an administrator sells the land of his intestate, and out of the proceeds pays off a mortgage made by the intestate and his wife: *Jones* v. *Bragg*, 33 Mo. 337; 84 Am. Dec. 49, and note.

ONE CANNOT DENY THE EXISTENCE OF A DOWER RIGHT, where he has paid less than a fair value for land, because he bought it subject to a contingent right of dower in the grantor's wife: *Pepper* v. *Thomas*, 85 Ky. 539.

DOWER, WHICH IS YET UNASSIGNED, is but a right of action: *McCammon* v. *Detroit etc. R. R. Co.*, 66 Mich. 442.

SPENCE *v.* EMERINE.

[46 OHIO STATE, 433.]

WARRANT OF ATTORNEY TO CONFESS JUDGMENT MUST BE STRICTLY CONSTRUED.

WARRANT OF ATTORNEY ATTACHED TO SEALED NOTE PAYABLE TO PAYEE or bearer, authorizing "any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio and confess judgment against us for the amount due thereon, with interest and costs, and to release all errors and the right of appeal," does not confer authority to confess judgment against the maker of the note in favor of a holder to whom the payee transferred it by delivery; and judgment cannot, by virtue of such warrant of attorney, be rendered against the maker of the note in favor of such holder without summons or other notice to the maker of the bringing of the action.

ANDREW EMERINE, to whom the following note had been transferred by delivery, took a judgment thereon against the plaintiff in error, under the warrant of attorney attached thereto:—

"$250.00. SPRINGFIELD, OHIO, December 17, 1885.

"On the first day of October, 1887, I promise to pay to E. S. Clark, or bearer, $250, for value received, with six per cent interest from and after September 1, 1886, until due, and eight per cent after due; interest to be paid annually after maturity. And we jointly and severally hereby authorize any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio and confess judgment against us for the amount then due thereon, with interest and costs, and to release all errors and the right of appeal.

"Witness our hands and seals. JOHN SPENCE." [SEAL.]

The plaintiff in error filed a petition in error to reverse this judgment, and made the following assignment of error: "Said court of common pleas erred in rendering judgment in favor of the defendant in error, without summons or other notice of the bringing of said action, by virtue of a warrant of attorney attached to the note sued on in said case below, because said warrant did not authorize the confession of a judgment in favor of said defendant in error, and said common pleas court therefore had no jurisdiction over the person of the plaintiff in error."

Harrison, Olds, and Marsh, Bowman, and Bowman, for the plaintiff in error.

McCauley and Weller, for the defendant in error.

DICKMAN, J. Although at common law a note under seal is not negotiable, either by delivery or indorsement, so as to enable the holder to maintain an action upon it in his own name, the sealed note now under consideration became negotiable by statute, unless its negotiability was destroyed by the warrant of attorney attached to it. It is provided by section 3171 of the Revised Statutes that all bonds and promissory notes for a sum certain, and payable to any person or order, shall be negotiable by indorsement thereon; "and all such instruments payable to a person or bearer shall be negotiable by delivery." In this state it is held that if the note is in itself certain and perfect, without conditions, it may remain negotiable, although the power of attorney to confess judgment attached to and forming a part of the note may not, by its terms, operate in favor of an indorsee or transferee of the note: *Osborn* v. *Hawley*, 19 Ohio, 130.

Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But it is an established principle that an authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties: *Cushman* v. *Welsh*, 19 Ohio St. 536; *Cowie* v. *Allaway*, 8 Term Rep. 257; *Henshall* v. *Matthew*, 1 Dowl. Pr. 217; *Foster* v. *Claggett*, 6 Id. 524; *Manufacturers' and Mechanics' Bank* v. *St. John*, 5 Hill, 497. In all cases of special agency, an agent constituted for a particular purpose, and under a limited power, cannot bind

his principal if he exceeds that power. The special authority must be strictly pursued: 2 Kent's Com. 621. And the same principle may be traced back to the Roman law, by which, when the authority was express or special, the agent was bound to act within it.

The plaintiff in error, in executing the note, might be presumed to have authorized an attorney to enter up a judgment against him in favor of the payee, when he would not be presumed to have consented to stand in the relation of judgment debtor to a stranger or adverse holder, to whom the payee might indorse or deliver the note. The maker might well insist upon a strict construction of the power granted, when the payee, by transferring the note before maturity, might preclude a defense which he might have at maturity. The power of attorney attached to the note in controversy does not, in express language, authorize a confession of judgment in favor of any one, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error to whom the note was transferred by delivery.

In *Osborn* v. *Hawley*, *supra*, as appears from a certified copy of the journal entry in the court of common pleas, upon which error was assigned, the warrant of attorney did not indicate in whose favor a judgment might be confessed, and it was held that when the legal title to the note was transferred, such power of attorney became invalid and inoperative, and no authority whatever could be exercised under it for the benefit of the indorsee.

In *Marsden* v. *Soper*, 11 Ohio St. 503, the warrant of attorney under which judgment was confessed purported to authorize such confession "in favor of any holders of this obligation," at any time after the same became due; but the court questioned whether such a warrant of attorney would be legally operative to authorize the confession of a judgment in favor of an indorsee of such note.

In *Cushman* v. *Welsh*, *supra*, the power was conferred by the terms of the instrument to confess judgment only "in favor of the legal holder of the note," and it was decided that a warrant of attorney for the confession of such a judgment did not authorize a confession of judgment on such note in favor of the owner and holder thereof, without an indorse-

ment thereon by the payee, as provided by the statute, transferring the legal title to such owner and holder of the note.

In *Watson* v. *Paine*, 25 Ohio St. 340, the warrant of attorney attached to the note gave authority to appear in any court of record in the United States, and confess a judgment against the makers "in favor of the holder of the note." The point was made in the case that the warrant of attorney did not authorize the waiving of process, or an appearance for the makers, in an action brought by an indorsee of the note; in other words, that the power of attorney was not negotiable. The court did not find it necessary to decide the point, but it was said by McIlvaine, J., in delivering the opinion of the court: "I am unable to find a reason why a power to confess judgment in favor of any holder of the note may not as well be used in favor of an indorsee as in favor of the payee."

In *Clements* v. *Hull*, 35 Ohio St. 141, the scope of the power was not limited, as in *Cushman* v. *Welsh*, *supra*, in favor of the legal holder only, but the authority given by the warrant of attorney was, "to confess judgment in favor of the holder of said note." It was by virtue of such language in the warrant that the court was of opinion that the power authorizing waiver of process and confession of judgment might be executed in favor of an equitable owner and holder, to whom the sealed note, payable to a designated payee or bearer, had been transferred by delivery, without indorsement thereon as required by the statute.

It will thus be seen that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a legal holder, or holder of the note. The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction.

In accordance with the views which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on did not authorize a confession of judgment in favor of defendant in error, and there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the court of common pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him.

We are therefore of opinion that the judgment of the court

of common pleas should be reversed, and the petition in that court dismissed without prejudice.

Judgment accordingly.

AUTHORITY TO ENTER JUDGMENT BY CONFESSION must be strictly construed: Cases cited in note to *Lee* v. *Figg*, 99 Am. Dec. 276, 278; for the general rule is, that powers of attorney must be subjected to a strict construction: Note to *Davenport* v. *Parsons*, 81 Id. 777.

MYERS *v.* STATE.

[46 OHIO STATE, 473.]

CONTEMPT OF COURT, PUBLISHING LIBEL ON JUDGE IS, WHEN. — The publication by a newspaper correspondent of a libel upon the presiding judge of a court engaged at the time in the trial of a cause, with intent to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus bring it into contempt, to inflame the prejudices of the people against it, to lead them to believe that the trial then being conducted was a farce and an outrage, having its foundation in fraud and wrong on the part of the judge and other officers of the court, to prejudice the minds of the jury, and thus prevent a fair and impartial trial, and to irritate the mind of the judge, and thus to more or less unfit him for the exercise of a clear and impartial judgment, tends directly to obstruct the administration of justice in reference to the case on trial, and is a contempt of court.

MISBEHAVIOR SO NEAR TO COURT AS TO OBSTRUCT ITS BUSINESS IS CONTEMPT. — The publication of an article calculated to obstruct the administration of justice comes within the statutory provision: "A court or judge at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice"; although the article be not written or circulated by the writer in the presence of the court, where the publication was in the court-room as well as elsewhere, and was intended to have effect, and did in fact have effect, there.

PROCEEDINGS IN CONTEMPT ARE REVIEWABLE ON ERROR. — The discretion of a judge in imposing punishment for contempt is a reasonable discretion, and its exercise is reviewable.

JUDGE IS NOT DISQUALIFIED FROM TRYING PROCEEDING IN CONTEMPT by the fact that the misbehavior of the respondent is the publication by him of a libel in large part against the judge, where the offense constituting the contempt consists of the tendency of the act to prevent a fair trial of a cause then pending in the court. And the fact that in committing this offense the respondent also libels the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice.

JUDICIAL NOTICE, OF WHAT FACTS JUDGE MAY AND MAY NOT TAKE. — In a proceeding for contempt of court, it is competent for the judge to take judicial notice of pertinent facts connected with the transaction,

which came within the cognizance of his own senses. But it is error for him to take judicial notice of the facts which formed the ground of a previous proceeding in the same court for contempt against the respondent, and of his having been found guilty therein; and if it appears that the consideration of those facts may have influenced the judge in the exercise of his discretion in fixing the penalty, the proceeding will be reversed for such error.

PROCEEDING for contempt of court. The plaintiff in error was tried in the common pleas of Franklin County upon a charge of contempt for having written, and caused to be published, a certain article in a Cincinnati newspaper. There was, at the time of the writing and publishing of the article, upon trial in said court an indictment against one Montgomery for changing and altering the tally-sheet of a precinct in the city of Columbus, just after the state election in 1885. The plaintiff in error was jointly indicted with Montgomery, and the case was still pending against him. The article, among other things, charged that the grand jury which found said indictment was called by the judge of said court, then presiding, "for a special partisan purpose," and "never honestly drawn from the box"; that the presiding judge, co-operating with the clerk and prosecutor, had packed the grand jury, and that the writer had, in this manner, been indicted "by rascally and infamous methods." The plaintiff in error knew at the time of the writing and publishing of the article that the paper in which it appeared was freely circulated about the court-house and in the court-room. The article was in fact read on the day of its publication by many persons in the court-room, and was much talked about within the bar of the court, and in the presence and hearing of the court. An information was presented by counsel specially appointed for the purpose, charging the plaintiff in error with having written and published the article to vilify, degrade, and defame the court and its officers, to bring them into contempt, and to obstruct the administration of justice. The respondent answered denying the jurisdiction of the court, and also denying any intention to commit a contempt, or to obstruct the administration of justice. He alleged that he had been a correspondent of the paper for years, and wrote the article as an answer to an article which had appeared a short time before in another Cincinnati paper; that he believed the facts and information upon which the article was written were true; that the article was, before its publication, read to a member of the bar of Hamilton County of high standing,

who gave his opinion that its publication would not be a contempt of court, which opinion was concurred in by another lawyer of experience; and that the article was written under the influence of feelings engendered by his personal knowledge of the fact that a grievous and irreparable wrong was being done him in connection with the prosecution of the case referred to. Both parties introduced evidence, and the court also took judicial notice of certain facts, some of which are referred to in the opinion. The respondent was found guilty, and sentenced to pay a fine of $250 and costs, and be imprisoned ninety days, and stand committed until he paid the fine and costs.

R. A. Harrison, E. L. Taylor, and T. E. Powell, for the plaintiff in error.

J. T. Holmes and J. H. Collins, for the defendant in error.

By COURT. The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial. Besides, the tendency was, when read by the judge, to produce irritation, and to a greater or less extent render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court. The fact that, before its publication, a professional opinion was given that the publication would not be a contempt does not change the essential character of the defamatory article, nor relieve the respondent of responsibility for its origin and dissemination. Neither was he justified in resorting to such means to right any real or imaginary wrong to himself in respect to the finding of the indictment. A plea in abatement would have searched the record, and caused the indictment to be set aside, if found by an illegal body or procured by improper means.

The publication came within section 5639, Revised Statutes, which reads: "A court, or judge at chambers, may punish,

summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." It is true that the article was not written nor was it circulated by the respondent in the presence of the court. Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the court-room as well as elsewhere. It was intended to have effect, and did have effect, in the court-house at Columbus, and the writer was just as much responsible for that effect as though he had in the court-room itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libelous words verbally. The acts were thus done, if not in the very presence of the court, at least so near thereto as to obstruct its business. For violation of the foregoing section of the statute, the punishment is within the discretion of the court. Section 5645, which provides for the punishment by fine of not more than five hundred dollars, and imprisonment for not more than ten days, applies to offenses covered by section 5640, but not to the preceding one, above quoted. The discretion here given is a sound, reasonable discretion, and its exercise in a case of this kind is reviewable. It therefore becomes unimportant to consider the question much argued, viz. whether or not the legislature may interfere with the inherent power of courts to punish for contempt. And as the court had power to try summarily, the form of the complaint is not a material question.

Though the libel was, in large part, against the presiding judge, that fact did not disqualify him from trying the proceeding in contempt. It was not the libel against the judge which constituted the offense for which the respondent was liable as for a contempt of court. The offense consisted in the tendency of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the contempt, and for which he could be punished summarily; and the fact that, in committing this offense, he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice.

The statute clearly authorizes, as did the common law, courts to punish summarily, as contempts, acts calculated to obstruct their business. They could not be maintained without such power, nor could litigants obtain a fair consideration

of their causes in a court where the jury or judge should be subject, during the trial, to influences in respect to the case upon trial calculated to impair their capacity to act impartially between the parties. Nor is there serious danger to the citizen in its exercise. Power must be lodged somewhere, and that it is possible to abuse it is no argument against its proper exercise. But we think the danger more imaginary than real. The judgments of all inferior courts are subject to review. We have an untrammeled press, which, in legitimate ways, may properly exert a powerful influence upon public opinion. All judges are liable to impeachment for any misdemeanor in office. Our entire judiciary is elective, and all courts are thus easily within the reach of the people. These checks can, we think, be relied upon to prove an adequate protection to the citizen against any arbitrary or unreasonable use of the discretion thus given to the courts.

In considering and disposing of the case, the court took judicial notice, without knowledge on the part of the respondent that it would be done, of many matters, among them the following:—

"That said respondent left the city of Columbus for his home in Cincinnati, Ohio, on or about the twenty-ninth day of February, 1888, under his promise to counsel for the state in the said trial, then pending, to return as a witness upon a telegram at any time one might be sent him; that he received such telegraphic notice, and answered it on the fifth day of March, 1888, that he would attend as such witness on the following day; that instead of so attending, he purposely went beyond the limits of the state of Ohio, to evade the service of process of any kind from this court upon him, and so remained until the end of the trial aforesaid; that said respondent attended said trial, and drew his pay as a witness for said defendant, from said twenty-fourth day of January, 1888, until the first day of March, 1888, and then absented himself, without leave, and in violation of the order of the court, until said trial ended, and has since, to wit, on the seventh day of April, 1888, been tried, and adjudged by this court in contempt, and fined for such absence, and has paid such fine and costs."

It was competent for the court to take judicial notice of pertinent facts connected with the transaction which came within the cognizance of his own senses. But when the court assumed to take judicial notice of the facts which formed the

ground of a previous proceeding for contempt against respondent, and of his being adjudged guilty, we think the court erred. If the facts were competent to be taken into consideration, which is, at least, very questionable, they were the subject of evidence, and could not be judicially noticed. Proof of a previous like offense is not competent evidence save in a small class of cases where guilty knowledge is a necessary element to be shown by the state, and such proof was not necessary in this case. Beyond this, the proceeding there noticed could have been heard before any other judge of the court, and had it been, the impropriety of taking judicial notice of what was proven, and of the result, would be apparent to every one; and it is none the less so from the fact that the proceeding may have been heard by the judge who tried the case in review. The consideration of this incompetent matter was calculated to have a potent influence in determining the sentence imposed. In a case where the penalty is limited by statute, and the sentence is the lowest allowed by law, and where, upon the whole record, the punishment seems justified, a reviewing court might not feel it a duty to disturb the judgment for an error of the character referred to. But in a case where the penalty is discretionary, and it appears, as in this case, upon the whole record, that the punishment is severe, and the court cannot say that the incompetent matter did not affect the degree of punishment inflicted, we feel compelled to reverse the judgment, and remand the cause for further proceedings.

Judgment accordingly.

CONTEMPT. — Publications in newspapers commenting upon proceedings pending in court, which reflect upon the judge, jury, or parties, or impugn the motives of the officers of the court, with the purpose of obstructing or impeding the administration of justice, constitute contempt, which may be punished by attachment: Note to *State* v. *Galloway*, 98 Am. Dec. 416 et seq.

APPEAL IN CASES OF CONTEMPT. — The weight of authority in the United States is in favor of the rule that, where one has been fined or committed for a contempt of court, he can have no appeal, or writ of error, *habeas corpus*, or other relief, unless by the express provisions of some statute: Note to *Clark* v. *People*, 12 Am. Dec. 185; but at page 186 of that note are collected some cases in which an appeal has been held to lie from a judgment of contempt. Compare *State* v. *Galloway*, 5 Cold. 326; 98 Am. Dec. 404, and note.

WHO CAN PUNISH FOR CONTEMPT. — Only the court in which a contempt is committed can punish it: Note to *Clark* v. *People*, 12 Am. Dec. 183, 184.

ROUSE *v.* MERCHANTS' NATIONAL BANK.

[46 OHIO STATE, 493.]

INSOLVENT CORPORATION CANNOT PREFER ONE CREDITOR TO ANOTHER. — When a corporation, for profit, organized under the laws of Ohio, becomes insolvent and ceases to carry on its business, or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors in proportion to the amounts of their respective claims, and it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors.

ACTION brought by the defendant in error against the plaintiff in error to compel the allowance of a claim, and to establish the priority of a certain mortgage lien. It appears, from the facts found by the court below, that on the twenty-third day of July, 1884, the T. J. Nottingham Manufacturing and Supply Company, being insolvent, resolved to make a general assignment of its property for the benefit of its creditors, and to give a mortgage on the same property to the plaintiff below, and other mortgages to other creditors, which mortgages should have preference over the assignment. On the 25th of July, 1884, the mortgages were executed and filed in the recorder's office of Hamilton County, and, an hour or two later, on the same day, the assignment was filed with the judge of the probate court. The assignment was made to F. W. Browne, but he was subsequently removed, and George L. Rouse was appointed trustee to administer the assignment. Rouse rejected the claim of the bank, and it brought this action to compel him to allow it. The court below found that the mortgage to the bank was valid and had a preference over the assignment. Other facts are stated in the opinion.

Lincoln, Stephens, and Lincoln, Watson, Burr, and Livesay, and Albery and Albery, for the plaintiff in error.

John W. Herron, for the defendant in error.

WILLIAMS, J. The general question for decision in this case is, whether a corporation for profit, organized under the laws of this state, can, in the disposition of the corporate property, after it has become insolvent, and ceased to further prosecute the objects for which it was created, prefer some of its creditors over others.

The claim of the plaintiff in error is, that when the corpo-

ration becomes insolvent, and ceases to carry on business, its property and assets constitute a trust fund for the benefit of its creditors, and the directors in possession of the corporate property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporate creditors. The defendant in error, on the other hand, contends that when not restricted by the law of their creation, or prevented by the operation of some bankrupt or insolvent law, insolvent corporations may, the same as natural persons, make preferences among their creditors.

Decisions of courts will be found maintaining each of these diverse positions. The precise question has not been decided in this state, and in view of the conflict of authority elsewhere, we are at liberty to adopt that rule which best harmonizes with the policy and legislation of the state, rests upon the sounder reason, as we conceive it to be, and coincides with our sense of justice and right.

The right of the individual debtor to prefer one creditor to another, though at the time insolvent, rests upon his complete dominion over and consequent unrestricted power of disposition of his property; and the cases which hold that insolvent corporations are entitled to make preferences among their creditors attribute to them the same unlimited control over their property that is possessed by individuals over theirs. In *Catlin* v. *Eagle Bank of New Haven*, 6 Conn. 233, which is the leading case in this country maintaining the right of an insolvent corporation to prefer one or more of its creditors over others, the decision is distinctly placed upon the ground that the particular corporation was invested with the control and power to dispose of the corporate property as fully and to the same extent that natural persons have with respect to their property. Hosmer, C. J., in the opinion in that case, says: "If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. . . . . The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason for the slightest difference between them." And again, he says that "no express trust was created on the happening of the bank's insolvency; but the charter, on every fair principle of construction, conferred on the corporation the entire control of its property, as well after as before this event. . . . .

The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises."

We have not the charter of the corporation in question in that case before us, but we assume that the learned judge was correct in saying that, by every fair construction, it conferred upon the corporation the entire control of its property after its insolvency; if so, no fault need be found with his conclusion, that it might, like any individual, prefer some of its creditors over others.

Corporations generally do not possess such amplified powers, and especially those created under the laws of this state. In this state, corporations have not the same powers and capacities as natural persons, but are authorized for specified and defined purposes. They are clothed with those attributes only with which the law, under which they are created, invests them, and can exercise no powers not expressly conferred, or necessary to carry into effect those in terms granted.

Since the constitution of 1851, it has been the settled policy of this state to afford adequate protection to the creditors of corporations. That constitution contains the provision that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Legislation, under this constitution, has been shaped to fully effectuate the constitutional guaranty. All corporations organized for profit are required to have a capital stock, fifty per cent of which must be subscribed, and at least ten per cent paid in, before the organization can be effected; and the stockholders are made liable, in addition to their stock, to an amount equal to the stock held by them, to secure the payment of the debts of the corporation. This liability, it has uniformly been held by this court, is a security exclusively for the benefit of the creditors of the corporation, over which the corporation has no control; and, moreover, the security is for the equal benefit of all the creditors. The suit to enforce it must be by all the creditors, and against all the stockholders; and no creditor can acquire priority over the others with respect to it; and

while power is conferred on corporations to reduce their capital stock, it is expressly provided that the rights of creditors shall not be affected, nor in any way impaired. The corporate powers, business, and property of the corporation must be exercised, conducted, and controlled by a board of directors, all of whom must be stockholders; and as a still further guaranty for creditors, the powers of corporations over their property, its use and disposition, are so circumscribed by positive statute that no corporation can employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation. The extent of the powers expressly conferred on them are, to sue and be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the incorporation, to make and use a common seal, and do all needful acts to carry into effect the objects for which they are created. It is obvious that the corporate property cannot with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may, without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it cannot lawfully be diverted to any other purpose. As soon as acquired, it becomes impressed with the character of a trust fund for that purpose, and the share-holder or creditor may interpose to prevent its diversion from the objects of the incorporation injurious to him: Taylor on Private Corporations, sec. 34.

The custody and control of the property, and the management of the business of the corporation, are confided to a board of directors chosen by the share-holders. Into the hands of these officers, through whom alone corporations can act, the share-holders surrender their funds, and intrust the management of the affairs and property of the corporation to them. A relation of trust and confidence, therefore, arises between the stockholders and directors of a corporation, out of which grow the duties of the latter to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination

of the corporation, to distribute to them their respective shares of the corporate property, after the payment of its debts and liabilities. These duties are eminently of a fiduciary nature. It is now so well established as to be no longer a subject of controversy, that the relation of trustee and *cestui que trust* subsists between the directors and share-holders. And since the directors, as such trustees, represent and act for all the share-holders, they cannot lawfully favor any particular share-holder or class of share-holders; but every authority and power possessed by them must be exercised for the benefit of all alike. Otherwise, no corporation could endure. If the directors and officers of a corporation were allowed, in the conduct of the business and disposition of the property, to favor one or more share-holders to the detriment of the others, the minority would be the prey of the majority; for it would then be within the power of the majority to combine and elect the officers, who in turn should manage the whole business, and apply the whole corporate property for the benefit of the majority, and thus practically confiscate the entire property interest of the minority. Corporations would thus become traps for the unwary, and legalized instruments of fraud. The doctrine that the directors are trustees for the share-holders, and for the equal benefit of all, it is obvious, is essential to the existence of corporations.

But it is the right of the creditors, equally with the share-holders, to have the corporate property applied to the purposes for which the corporation was created, and this includes the payment of the corporate indebtedness contracted in the prosecution of its business. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders.

In Perry on Trusts, section 242, the relative rights of the creditors and share-holders are thus defined: "A corporation holds its property in trust, —1. To pay its creditors; and 2. To distribute to its stockholders *pro rata*. If, therefore, a corporation should dissolve, and divide its property among its share-holders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom the property had come, into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands."

It is now firmly established that the property and assets of

a corporation are a trust fund for the payment of its debts, especially in case of its insolvency. Since the case of *Wood* v. *Dummer*, 3 Mason, 311, where Mr. Justice Story is said to have first formulated the doctrine, it has been generally accepted, and is sustained by the highest authority. Mr. Justice Swayne announces it with great clearness, in *Sanger* v. *Upton*, 91 U. S. 56, 60, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liabilities which subsist in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security." In *Curran* v. *State of Arkansas*, 15 How. 312, Mr. Justice Curtis said on this subject: "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of its creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied." And in *Upton* v. *Tribilcock*, 91 U. S. 45, 47, Mr. Justice Hunt thus lays down the doctrine: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its share-holders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. It violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The doctrine is sustained by many authorities: 2 Story's Eq. Jur., sec. 1252; Pomeroy's Eq. Jur., sec. 1046; Taylor on Private Corporations, secs. 654, 655; *Haywood* v. *Lincoln Lumber Co.*, 64 Wis. 639. It was held by this court as early as *Taylor* v. *Miami Exporting Co.*, 5 Ohio, 165, 22 Am. Dec. 785, where the opinion of Mr. Justice Story in *Wood* v. *Dummer*, *supra*, is quoted with approbation; and it is more distinctly announced in the later case of *Goodin* v. *Cincinnati etc. Canal Co.*, 18 Ohio St. 182, 98 Am. Dec. 95, where it is said to be "well settled that the property of a cor-

poration is a trust fund in the hands of its directors for the benefit of its creditors and stockholders."

It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows that after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property become trustees thereof for the creditors; and this relation necessarily forbids any discrimination between the beneficiaries in the distribution or application of the fund. The due execution of the trust demands absolute impartiality toward the *cestui que trustent.* They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear that if the corporate property constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession are without authority to dispose of it in disregard of the rights of any creditor. They can no more discriminate between creditors in such case than they could before the insolvency of the corporation between the share-holders. The objects for which the corporation was created being no longer prosecuted, and the occasion for the exercise by the board of directors of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity, the corporate property becomes the property of the creditors, and their equities are equal. Every creditor, who became such by parting with his money, property, or other thing of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors become fixed instantly and equally; for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor. This interest is sometimes called the equitable lien of the creditor on the corporate property, which enables him to follow it, even after it has left the hands of the directors, wherever it can be found, except in the possession of *bona fide* purchasers for value, and subject it to the payment of the corporate indebtedness. It would seem to result as a necessary consequence that insolvent corporations which have ceased to carry on business can-

not, by pledge or mortgage of the corporate property to some of the creditors, in payment or security of antecedent debts, without other consideration, create valid preferences in their favor over others; and this is the view maintained by the more recent writers on the subject.

In the last edition of Taylor on Private Corporations, it is said: "When corporations become insolvent, the duty of the directors toward its creditors becomes even stricter and more imperative; for, under such circumstances, the rights of creditors are paramount, and it has become probable that they will be somewhat damaged; and the plain duty of directors, who control the funds from which corporate debts are paid, is to see that the loss is as small as possible. Moreover, since, upon the insolvency of the corporation, the rights of unsecured creditors are equal, it would seem to be unlawful, even in the absence of a statute expressly forbidding it, for directors to make preferences among them": Sec. 759. And in section 668, it is further said: "To allow an insolvent corporation to make an assignment of its property, giving preferences to a portion of its creditors over the others, is unjust as well as utterly repugnant to the doctrine that corporate property is a trust fund, on the credit of which persons contract with the corporation. If such property constitutes such a fund, it is clearly held in trust for the benefit of one creditor just as much as another, and to prefer one creditor to another is evidently beyond the authority of the trustee. This view is far from being unsupported by direct authority."

Mr. Morawetz, in his excellent work on private corporations, referring to the cases which hold that corporate preferences are valid, says: —

"This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security has often been recognized by the courts of equity in adjusting the rights of creditors among themselves, and in relation to the company's share-holders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the com-

pany and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property, in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner by giving it or its agents the power, after the company has become insolvent, and has ceased to carry on business, and after its share-holders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress. The doctrine that an insolvent corporation may prefer certain creditors at the expense of others seems to have been first started in *Catlin* v. *Eagle Bank*, 6 Conn. 233,—a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice": 2 Morawetz on Corporations, sec. 803.

And in a very recent work on insolvent corporations it is said: "The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation—the creditor's trust fund—may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preference. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations, as being a manifest travesty upon natural justice": Wait on Insolvent Corporations, sec. 162. "Elsewhere we have deprecated the right, which is recognized in a number of cases, of insolvent corporations to make preferential assignments. It would seem to be an idle waste of words to designate the capital and assets of a corporation as a trust fund for the benefit and security of creditors in the event of dissolution or insolvency, if one of the first principles of the law of trusts—equality of distribution—could be openly violated, and the effects of the bankrupt company apportioned among a favored few": Id., sec. 654.

Without extending the discussion, we are of opinion that

when a corporation for profit, organized under the laws of this state, becomes insolvent, and ceases to carry on its business or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over an assignment thereafter made for the benefit of creditors.

Instead of the individual liability of the stockholders being a ground of objection to this conclusion, it furnishes an additional reason in its support. It is well settled that the corporate property is the primary fund for the payment of the debts of the corporation, and the statutory liability of the stockholder is a security to be resorted to only when the payment of its debts cannot be enforced against its property; and it was held in *Harpold* v. *Stobart*, 46 Ohio St. 397, that stockholders who have assigned their stock to an insolvent assignee are liable only for such portion of the debts existing while they were such stockholders as is equal to the proportion which their stock bears to the stock held by all stockholders liable for the same debts. Admit the power of the board of directors of an insolvent corporation to make preferences among its creditors, and it must follow that they may prefer any they choose to select for that purpose. This would be wholly inconsistent with the trust relation subsisting between the directors and share-holders; for since different stockholders, or classes of stockholders, may be liable for different debts, and not all for the same debts, if the directors could apply the corporate property to some of its debts, leaving others entirely unprovided for, they would be at liberty to select the debts for which particular stockholders alone were liable, and appropriate all of the property to their satisfaction, leaving the other stockholders to respond to the full extent of their statutory liability for the remaining debts. The directors would in this way be enabled to apply the whole corporate property to their own exoneration.

Whether an insolvent corporation, which is still a going concern, and in good faith engaged in the prosecution of its business, may borrow money, or contract, or procure an extension of other *bona fide* indebtedness, and convey or pledge the corporate property in security thereof, is a question not

involved in this case, and upon which we here express no opinion.

It appears, from the finding of facts in this case, that the directors of the corporation declared its insolvency, and directed by the same resolution the execution of an assignment for the benefit of its creditors, and of the preferential mortgages to the bank, and other creditors. It does not appear that there had been any agreement between the mortgagees and the corporation that such mortgages should be given, nor that they were given for any other consideration than the antecedent indebtedness of the corporation to the creditors receiving them. Being merely voluntary mortgages to secure pre-existing debts, without other consideration, they cannot prevail against the equitable rights of the corporate creditors: *Lewis* v. *Anderson*, 20 Ohio St. 281.

Counsel have argued at length, and with great ability, another question sufficiently raised on the record, and that is, whether, in view of the facts found by the court below that the execution of the assignment for the benefit of creditors, and the preferential mortgages, was directed by the same resolution, and were in fact executed at the same time, the several instruments may not be treated as constituting together an assignment in trust, with intent to prefer the mortgagees, and so inure to the equal benefit of all creditors. The determination of this question not being necessary to the decision of the case, no opinion is expressed upon it.

Other questions presented in the argument, and considered by the court, do not call for further report.

No serious objection is made here to so much of the judgment of the court below as establishes the amount of the plaintiff's claim, and requires the assignee to allow the same in the administration of his trust, and to that extent the judgment is affirmed. But the judgment establishing the validity of the mortgage, and giving it priority over the assignment, is reversed, and judgment will be entered upon that branch of the case for the trustee.

Judgment accordingly.

CORPORATIONS. — The capital stock of a corporation, including unpaid subscriptions thereto, constitute a trust fund for the benefit of the corporation creditors: *Marshall Foundry Co.* v. *Killian*, 99 N. C. 501; 6 Am. St. Rep. 539; *Thompson* v. *Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797, and note 808–810. But in *Sweeney* v. *Grape Sugar Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, it was decided that the assets of an insolvent corporation are

not a trust fund, but that creditors of the corporation might secure preferences therein by obtaining liens by judgments or otherwise. And in *Garrett* v. *Burlington Plow Co.*, 70 Iowa, 697, 59 Am. Rep. 461, where a debt of a corporation beyond the limit prescribed by its charter was held by its directors, and they in good faith took a mortgage on the corporation property for security, it was held that the mortgage gave them preference over other creditors, even though the corporation was insolvent when the mortgage was taken; but see note to same case, citing cases holding the contrary doctrine.

ARMSTRONG *v.* NATIONAL BANK.

[46 OHIO STATE, 512.]

CHECK PAYABLE TO NON-EXISTING PERSON NOT TREATED AS PAYABLE TO BEARER WHEN. — The doctrine which treats a check or bill made payable to a fictitious person or order as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. It does not apply to a check made payable to a non-existing person or order, the drawer of which has been induced by the fraud of a third person to so draw it, in the belief that the payee was a real person, and intending that payment should be made to such person. Where, therefore, a bank depositor is, by the fraud of a third person, induced to draw his check on the bank payable to a non-existing person, or order, in ignorance of the fact, and intending no fraud, the bank has no right to pay the check and charge the amount to the depositor upon its being presented by such third person indorsed by him and purporting to be indorsed by the person named therein as payee.

BANK IS BOUND TO SATISFY ITSELF OF GENUINENESS OF INDORSEMENT on a check made payable to a certain person or order; and the fact that the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such a person, when in fact there is not, does not excuse it for paying the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person.

ACTION brought by Kate S. D. Armstrong against the Pomeroy National Bank, to recover the sum of $450, due her upon a deposit which she had made with the bank. The facts are stated in the opinion.

E. A. Guthrie, for the plaintiff in error.

F. C. Russell, for the defendant in error.

MINSHALL, C. J. This case is in its general features analogous to that of *Dodge* v. *National Exchange Bank*, 20 Ohio St. 234, 5 Am. Rep. 648, and should, as we think, be ruled by it. There a paymaster of the United States, who kept his account at the bank, drew his check on the bank in payment of an indebtedness of the United States to Frederick B. Dodge, and delivered it to the person who presented the certificate, he

representing himself to be Dodge. This representation was false, and the person making it was a thief. Being a stranger to the paymaster, he at first refused to pay the claim to him, but on his assuring him that he could identify himself at the bank, the paymaster drew the check payable to Dodge or order, and delivered it to the person presenting the certificate. The amount of the check was paid him by the bank on his representing himself to be Dodge, and indorsing the check in that name. The bank had no knowledge of what had transpired prior to the presentation of the check for payment, and supposed it was paying it to the right person. In deciding the case, the court laid down the following principles:—

"1. The duty of a banker is to pay the checks and bills of his customer, drawn payable to order, to the person who becomes holder by a genuine indorsement; and he cannot charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position.

"2. When there is no fraud or special understanding between the banker and his customer, the liability of the banker for paying a check upon a forged indorsement cannot be affected by conduct of the customer in drawing the check, of which the banker had no notice."

The case was again brought to this court upon a question of evidence, and was assigned to and disposed of by the first commission, which, after a full and careful re-examination, approved and followed the former decision; and the principles announced in the case, after such careful consideration, must determine this one.

By the fraud of one Grimes, the plaintiff was induced to purchase a note that had no real existence, as a security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a check for the amount, payable to Brown, or his order. Now, it is evident, both upon reason and the authority of the previous decisions, that the circumstances under which the plaintiff was induced to give

the check, even though calculated to arouse suspicion on her part, cannot modify the duty required of the bank in the matter of paying or not paying the check. It is not claimed that the bank had any knowledge of how or under what circumstances Grimes had obtained the check, and there is no finding of any such course of dealing between the bank and the plaintiff as would have authorized it to depart from the general duty of a bank in paying the checks of its customers, drawn payable to a certain person or order. It was its duty to pay to the person named, or his order, and to withhold payment until it was satisfied, both as to the identity of the payee and the genuineness of his signature: Morse on Banking, sec. 474; *Robarts* v. *Tucker*, 16 Q. B. 560, per Maule, J., at p. 578.

It is found that the bank made the usual inquiries respecting the identity of Grimes, and in other respects was ordinarily careful and prudent in relation to the transaction; but this must be taken in connection with the further fact that Grimes was not the payee of the check, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the check, or any interest in it, as against the drawer. "There is no doubt," says Lord Kenyon in *Tatlock* v. *Harris*, 3 Term Rep. 181, "but that the indorsee of a bill of exchange, payable to order, must, in deriving his title, prove the handwriting of the first indorser": See *Mead* v. *Young*, 4 Id. 28, 30; 2 Parsons on Notes and Bills, 595. The indorsement on the check, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it is termed. As to it, the bank acted upon the representations of Grimes, and did not otherwise know whether it was genuine or not. As said in *Dodge* v. *National Exch. Bank*, 30 Ohio St. 1: "The rightful possession of a check by no means carries with it or implies a right to demand or receive payment of it without the genuine indorsement of the person to whose order it is made payable"; and if a banker accept or undertake to pay a check, "he must see to it, at his peril, that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. . . . . And this is true, whether the defendant exercised the degree of caution which bankers usually do in such cases, or not. The question is, Was the check paid to the party to whom, by its terms, it was made payable?" Therefore the court rightly concluded, as a

question of law, from the facts found, that the payment of the check by the defendant was not authorized by the plaintiff, and that it could not rightly be charged to her account.

The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties: *Tatlock* v. *Harris*, 3 Term Rep. 174, 180; *Vere* v. *Lewis*, 3 Id. 182; *Minet* v. *Gibson*, 3 Id. 481; in the House of Lords on error, *Gibson* v. *Minet*, 1 H. Black. 569; *Collis* v. *Emett*, 1 Id. 313; *Gibson* v. *Hunter*, 2 Id. 187.

The doctrine that a bill payable to a fictitious person or order is equivalent to one payable to bearer had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground that the acceptor knew, at the time of his acceptance, that the bill was payable to a fictitious person; and but for this fact, the fictitious indorsement would have been held to be a forgery,—some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor: 3 Term Rep. 181. These cases will be found reviewed in a note to *Bennett* v. *Farrell*, 1 Camp. 130. It was held, in this case, that a bill made payable to a fictitious person or order is neither payable to the order of the drawer or bearer, but is completely void. But in an *addendum* to the case, at page 180 c of the report, Lord Ellenborough observes that this holding must be taken with this qualification: "Unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The rule, with this qualification, is stated as the law in Byles on Bills, 73. See also, to the same effect, *Forbes* v. *Espy*, 21 Ohio St. 483; 1 Randolph on Commercial Paper, secs. 162–164; 2 Parsons on Notes and Bills, 591, and note *a*. Mr. Daniel, in his work on negotiable instruments, section 139, states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text: 1 Randolph on Commercial Paper, sec. 164, note 4. And, upon principle, we do not see how the law could be held to be

otherwise. For if the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name, with intent to defraud, perpetrates a forgery, and the indorsement is void, a general intent to defraud being sufficient to constitute the offense.

The case of *Lane* v. *Krekle*, 22 Iowa, 399, is not in point; for there the note was made payable to a fictitious person "or bearer," and passed by delivery without indorsement. The case of *Phillips* v. *Im Thurn*, 114 Eng. Com. L. 694, cited by the learned judge, is clearly distinguishable from the case before us. There the signature of the drawer, as well as the indorsement, was a forgery; but the defendant, the acceptor, was held liable, because the plaintiff discounted the paper, relying, in good faith, upon the acceptance of the defendant. The case was finally disposed of on a case stated, reported in L. R. 1 Com. P. 463. The ground of the decision appears from the following observations of Keating, J., page 472: "I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching, by his acceptance of it, the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs, which enabled the person representing Plana to obtain money from the plaintiffs on the bill." The decision in this case simply followed a well-recognized principle in the law of notes and bills. It is thus stated by Mr. Smith: "Though the drawer's signature be forged, the drawee, if he accepts the bill, is bound to pay it, provided it be in the hands of a holder *bona fide* and for value; for the drawee's acceptance admits the drawer's handwriting to be genuine": Smith's Mercantile Law, 334. Now, Mrs. Armstrong can in no way be said to have affirmed, by any act of hers, that the indorsement upon the check was genuine, for there was no indorsement on it when it left her hands.

The case of *Rogers* v. *Ware*, 2 Neb. 29, cited by counsel for defendant in error, does not support his contention. The case of *Ort* v. *Fowler*, 31 Kan. 478, 47 Am. Rep. 501, was rested upon a number of grounds; and, in so far as it may have been on the ground that a note made payable to a fictitious person or order is, in effect, payable to bearer, irrespective of the knowledge of the maker, it simply follows the authority of 1 Daniel on Negotiable Instruments, section 139, which, we have shown, is not borne out by the cases relied on.

If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is, that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: 1. The identity of the indorser; and 2. The genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived where both the signature and the person whose signature it purports to be are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters, and on which bankers ordinarily rely, for he would be without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that, if he acts at all, it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make instead of withholding payment, he acts at his peril, and must sustain whatever loss may ensue. It is a saying frequently repeated in The Doctor and Student, that "he who loveth peril shall perish in it." In

other words, where a person has a safe way, and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.

The case of *Vagliano Brothers* v. *Bank of England*, recently decided in England by the court of appeal, 23 Q. B. Div. 243, and called to my attention since the above opinion was written, fully supports the conclusion we have reached.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

PAYMENT OF FORGED CHECKS are made at the risk of him who pays: Note to *National Park Bank* v. *Seaboard Bank*, 11 Am. St. Rep. 616.

AS TO HOW FAR BANKS ARE BOUND TO KNOW INDORSEMENTS, and their liability for paying checks upon which indorsements have been forged: *Levy* v. *Bank of America*, 24 La. Ann. 220; 13 Am. Rep. 124; *Seventh National Bank* v. *Cook*, 73 Pa. St. 483; 13 Am. Rep. 751, and note 752; *Welsh* v. *German American Bank*, 73 N. Y. 424; 29 Am. Rep. 175.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Appeal of Fulmer.

[128 Pennsylvania State, 24.]

Co-tenancy — Accounting between Tenants in Common. — As between tenants in common of an opened and developed slate quarry, the compensation which the tenant out of possession is entitled to receive from the tenant in possession taking out slate is to be measured by the market value of the slate in place, or in a state of nature; this being the value of the royalty or slate-leave which can be obtained for the privilege of removing and manufacturing the slate under the circumstances of the case.

Bill in equity for an accounting on behalf of a tenant in common out of possession, as against the tenant in possession, and removing slate from a quarry owned by them in common, of the quantity and value of the slate removed, and also an accounting for all rents and profits received or made from the exclusive use, occupancy, and enjoyment of the common property; and also for general relief. The appellant assigns error in the decree of the court of common pleas.

Edward Harvey, for the appellant.

R. E. Wright, for the appellee.

Green, J. There is but a single and very narrow question for decision in this case. It is agreed on both sides that the defendant shall account to the plaintiff for the value of the slate in place. But in the determination of what was the value of the slate in place, the master adopted one method and the court another. The master held that the value of the slate on the bank, less the cost of mining and putting it there, with a

margin for a fair and reasonable profit to the operator, represented the value of the slate in place, and therefore charged the defendant with the valuation thus produced. The court, however, held that the value of the royalty or slate-leave which could be obtained for the privilege of removing and manufacturing the slate was the true representative of the value of the slate in place, and therefore reversed the finding of the master, and charged the defendant upon the latter principle. The difference in the resulting figures is very considerable, and only one of the two methods can be correct.

The act of April 25, 1850, Pamph. Laws, 573, which subjects tenants in common in possession of mineral lands to accountability to their co-tenants for minerals taken out, provides only that the sum which "may be justly and equitably due" shall be ascertained and paid. This language is perhaps sufficiently general to give rise to different views as to what sum it is that "may be justly and equitably due" in any given case, and the solution of the question depends somewhat upon the circumstances of the particular case, and somewhat upon the true character of the relation existing between the parties. If the relation were one of partnership, of course the accounting partner would be responsible for whatever profit he might realize out of his dealing with the partnership property. In that view of the case the master's measure of liability would be certainly correct in any event, and doubtless a still more rigid accounting than he applied would have to be enforced. But the relation of tenants in common of land is not in any sense a relation of partnership. The tenant in possession may lawfully remain in possession, and may take minerals or other valuable products for his own advantage. His ownership is such that he cannot take his own share, without also at the same time and by the same act taking the share of his co-tenant. But in mining operations there is always more or less expense and risk which must necessarily be incurred by the person who conducts them. The tenant out of possession incurs none of the risk or expense when the mining operations are conducted exclusively by the tenant who is in possession. Nevertheless, he is entitled to be compensated for the appropriation by his co-tenant in possession for his proportion of the mineral taken by the latter, whether the appropriation be profitable or otherwise to the taker.

This view of the subject simplifies and narrows the scope of the inquiry. For the thing taken is mineral in place, as it lies

in a state of nature. It is this of which the tenant out of possession is deprived, and it is this for which he ought to be compensated. Where the mineral land has never been developed, and no mines or quarries have been opened, the fair market value of the mineral in place, which would be the value of the privilege of removing it, in view of all its special circumstances, would represent the true measure of compensation to the owner. So, too, if the land were fully developed and mines or quarries opened, and all the expenses incurred which enable the operator to proceed at once to the taking of the mineral, the value of the mineral in place, ready to be taken, would be enhanced by these considerations, and the price of the privilege of taking it in such circumstances would also represent the measure of compensation. It is manifest that in conducting this inquiry in a litigated case regard should be had to all the circumstances of the particular case, and the evidence should be directed to the special instance of the mine or quarry in question.

A reading of the testimony taken before the master shows that this is precisely what was done in the present case. On the part of the defendant a number of witnesses, all of them having competent knowledge of the property, and being themselves engaged in the same business, and thoroughly qualified to speak of the value of the privilege of removing the slate from this particular quarry, testified to their opinion of the value of that privilege as represented by a fixed price for the several kinds of slate produced. They took into their view all the circumstances of advantage and disadvantage in mining, preparing, and marketing the slate taken, and expressed their results in definite figures. Reviewing carefully, and as we think correctly, the whole of this testimony, the learned court below determined upon certain values for school-slate, roofing-slate, and mantel and blackboard stock taken out, and embodied them into a resulting decree, the fundamental idea of which was, that they represented the royalty or slate-leave at which the quarry could have been let. For the legal correctness of this treatment of the subject, the case of *Neel's Appeal*, 3 Pa. St. 66, was referred to, and it appears to support the reasoning of the court and the defendant's contention. We think, moreover, it is the just and equitable method of determining the value of the slate in place, when compensation for its removal is claimed by a tenant out of possession against a co-tenant in possession.

The learned master reached a different conclusion as to the manner of determining the value of the slate in place, influenced largely by the decision of this court in the case of *Coleman's Appeal*, 62 Pa. St. 252. An examination of that case, however, proves that it was altogether exceptional in its character, and was expressly limited to the particular facts under consideration. The general principles stated in the opinion are in entire harmony with the views herein expressed. Thus Mr. Justice Sharswood, in delivering the opinion, said: "The value of the ore in place is therefore the only just basis of account. That is the same as the value of the ore-leave; that is what the right to dig and take the ore is worth." He then inquires: "But how is the value of the ore-leave to be ascertained?" He proceeds to review the special facts of the case, and says that the value of the ore at the pit's mouth depends upon its quality, its proximity to the furnace where it is to be used, and the means of transportation; that, in addition to this, the price of the ore-leave will be influenced by the expense and risk of mining; that the price paid for ore-leave in other mines affords no criterion for this; that no sales of Cornwall ore-leave had ever been made, and that no evidence was given before the master as to what ore-leave from this bank would have commanded on the market. He adds that the master arrived at the value of the ore in place by ascertaining its value at the pit's mouth and then deducting from that the cost of mining, and says: "We cannot see that under all the circumstances any more just and equitable mode could have been adopted." But he takes care to say further: "We do not mean to say that it would hold in any other case than the one now before the court; certainly not where the mining is expensive and hazardous. . . . . But the case of the Cornwall ore-banks is very different and very peculiar. Very little outlay of capital was required. The wages of day-laborers, and the pick-ax and shovel, with occasional charges of powder for blasting, made up all that was provided. The returns were immediate; the ore was removed to be used or sold as soon as loosened. No personal skill or superintendence by the tenants in common was shown, and whatever was necessary was hired and allowed in the cost of mining." The whole tendency of the opinion was to show that there was no substantial difference between the value of the ore in place and its value at the pit's mouth, except the mere cost of digging and of removing it from the one place to the other. This, added to the

fact that there never had been any sales of ore-leave at the Cornwall banks, and no proof of the opinions of experts as to what such ore-leave was worth, impelled the adoption of the principle upon which the value of the ore-leave was determined. There was in fact no other method which could have been adopted in that case under the evidence on the record.

In the present case, it is only necessary to note the fact that abundant evidence was given as to the value of the royalty or slate-leave in this particular quarry by very experienced persons who knew it well, and had long been engaged in the same business; and the further fact that the value of the slate on the bank included, in addition to the cost of severance and removal, the cost also of splitting, dressing, and piling the roofing-slate, and splitting the school-slate and mantel and blackboard stock. In addition to this, personal skill and superintendence were required. As to the roofing-slate, the whole profit of manufacture thus enters into its cost on the bank, and a portion of that profit enters into the cost of the school-slate and other stock. It follows that, if the method adopted by the master is pursued, the plaintiff would recover, in addition to the real value of the slate in place, a share of the profits of carrying on the business without being subject to the risks or possible losses which might accrue, and this we think would not be just and equitable. The amounts allowed by the court are very fair and liberal to the plaintiff, under all the evidence, and he has no just cause of complaint.

The case of *Ege* v. *Kille*, 84 Pa. St. 333, was not a proceeding between tenants in common, but an action of trespass for mesne profits, and therefore a rather more stringent rule of accounting would be applicable to its facts. But, in addition to that consideration, it was a case of iron-ore mining, and came practically within the exceptional doctrine of *Coleman's Appeal*, *supra*, which it simply followed. That doctrine, however, as we have seen, has no general application, and is not controlling in cases circumstanced like the present.

The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.

CO-TENANCY — ACCOUNTING BETWEEN THE CO-TENANTS. — Where one tenant in common occupies and cultivates the common estate to the exclusion of his co-tenants, they may call him to an accounting for their share of rents and profits: *Bird* v. *Bird*, 15 Fla. 424; 21 Am. Rep. 296; *Kean* v. *Connelly*, 25 Minn. 222; 33 Am. Rep. 458; *Annely* v. *De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and note; *Holloway* v. *Holloway*, 97 Mo. 628; 10 Am. St. Rep.

339; note to *Early* v. *Friend*, 78 Am. Dec. 665–668. By the common law, a co-tenant is not answerable except for rents and profits by him received. He has a perfect right to possess, occupy, cultivate, and make profits out of the lands of the co-tenancy, and to retain such profits when made, provided he does not oust, or, after demand, exclude, his co-tenants from possession and the right to make profits also: Freeman on Cotenancy and Partition, secs. 274–276.

BROWNFIELD *v.* HUGHES.

[128 PENNSYLVANIA STATE, 194.]

NEGLIGENCE — INSTRUCTIONS. — In an action to recover damages for injury from an engine, the jury is properly instructed that "the burden was on plaintiff to show a negligent act of the defendant which was the proximate cause of the injury"; and that "unless the omission to have a platform erected around the engine was the proximate cause of the injury," the plaintiff could not recover. It was also held proper, in this case, to refuse to charge, the evidence being conflicting, "that there is no evidence in this case that the omission to erect the platform was the proximate cause of the injury."

PLEADING AND PRACTICE — INSTRUCTIONS. — WHERE EVIDENCE IS CONFLICTING, the jury should not be instructed that the verdict "must be for the defendant."

NEGLIGENCE — LIABILITY FROM USING DEFECTIVE MACHINERY. — While, as a general rule, an employee who continues to use machinery which he knows to be dangerous takes upon himself the risk of any accident that may result therefrom, still, if such employee, in pursuance of the promise of his employer to remedy the defect, and when the risk is not such as to threaten immediate danger, continues in his employment, and is injured, without fault on his part, the employer is liable.

CASE to recover damages for personal injuries resulting from negligence. Hughes was employed to run an engine for Brownfield, and it was his duty to test the temperature of the journals, and especially the crank-pin of the piston on the engine every few minutes. This crank-pin was five feet from the floor, while Hughes was five feet four inches in height, and from the peculiar way in which the foundation of the engine was built, it was necessary for him to lean over eight or nine inches in testing the crank-pin, and while so engaged, though there was a guard-rail three and one half feet high around the engine, his hand was caught and crushed in the machinery of the engine. Hughes's evidence tended to show that, several times before the accident, he had called the attention of Brownfield and his superintendent to the necessity of a platform about the engine, and had requested them to build it. This they promised to do if Hughes would continue in his employment. The

parties mentioned denied the promise, and sought to show that the engine was properly constructed and set up, and that building such a platform about it would render it dangerous. Verdict and judgment for plaintiff, and plaintiff in error takes a writ of error to this court.

M. Hampton Todd, for the plaintiff in error.

D. Webster Dougherty, for the defendant in error.

STERRETT, J. This case was submitted to the jury in a voluminous charge of eighteen printed pages, wherein their attention was called to the facts which it was claimed the evidence tended to establish, as well as the principles of law applicable thereto. The jury by their verdict found that the injury complained of resulted from defendant's neglect of duty, and that plaintiff below was not guilty of contributory negligence. It would be a waste of time to review either the evidence or the principles of law applicable to the case. The facts which the former tended to prove have been settled by the verdict, and as to the latter, they have been so well settled by repeated decisions of this court that discussion of them is unnecessary.

There is no complaint as to the admission or rejection of evidence; but it is claimed the evidence was insufficient. The last specification of error is to the refusal of the court below to instruct the jury that, under the evidence, their verdict "must be for the defendant." From a careful perusal of the testimony submitted to us, we think the court was clearly right in refusing to so instruct the jury. The evidence, which was somewhat conflicting, was quite sufficient to carry the case to the jury on the questions of negligence and contributory negligence involved in the issue.

Nor was there any error in the refusal of the court to charge, as further requested by defendant below, viz.: "There is no evidence in this case that the omission to erect the platform was the proximate cause of the injury." The facts upon which that question depended were solely for the determination of the jury, and were properly submitted to them. In his fifth and sixth points, defendant below requested the learned judge to charge as follows, on the subject of proximate cause: "The burden is on the plaintiff to show a negligent act of the defendant which was the proximate cause of the injury, and failing to do so, the verdict should be for defendant"; and

"unless the omission to have a platform erected around the engine was the proximate cause of the injury, the plaintiff cannot recover." Both of these propositions were affirmed, and the jury must have found that the omission to have the platform erected around the engine was in fact the proximate cause of the injury. In view of the fact that there was abundant evidence of such omission on the part of defendant, it would have been error to withdraw the question from the jury. The sixth and seventh specifications are not sustained.

The subjects of complaint in the first and second specifications, respectively, are portions of the general charge. We fail to discover any error in either of these excerpts, especially when they are considered, as they should be, in connection with other parts of the general charge.

The learned judge's answer to the points recited in the third and fourth specifications of error, when considered in connection with what he said on the same subject in the body of his charge, is substantially correct. As a general rule, it is true that an employee who continues to use a machine which he knows to be dangerous takes upon himself the risk of any accident that may result therefrom; but that principle has its qualifications, one of which is, that if the employee, in pursuance of the promise of his employer to remedy the defect, and the risk be not such as to threaten immediate danger, continue in his employment and be injured, without fault on his part, the employer may be liable. That exception to the general rule is recognized in several cases, among which is *Patterson* v. *Pittsburg etc. R. R. Co.*, 76 Pa. St. 394, 18 Am. Rep. 412, in which it is said: "But when the servant, in obedience to the requirement of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution, the rule is different. In such case the master is liable for a resulting accident." The facts of the present case, we think, fairly bring it within that exception to the general rule.

The fifth specification of error is not sustained. The answer therein complained of is free from error. There appears to be nothing in the record that requires a reversal of the judgment.

Judgment affirmed.

NEGLIGENCE IS ALWAYS A QUESTION OF FACT for the jury when there is a substantial conflict in the evidence with respect thereto: *Tetherow* v. *St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note.

CONTRIBUTORY NEGLIGENCE of a plaintiff must be the proximate cause of his injuries before it will bar a recovery by him: *Dickson* v. *Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note; compare *West* v. *Ward*, 77 Iowa, 323; 14 Am. St. Rep. 284, and note 286, 287, for instances of proximate cause of injuries.

BURDEN OF PROOF IN NEGLIGENCE CASES is upon him who alleges negligence: *Blanchard* v. *Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and particularly note 637, 638.

MASTER AND SERVANT. — A servant who uses a defective instrument, after having complained to his master as to its unfitness and defects, relying upon the master's promise to furnish a better and suitable instrument, can recover damages for injuries resulting from the use of such instrument: *Southern Kansas R'y Co.* v. *Croker*, 41 Kan. 747; 13 Am. St. Rep. 320; note to *Richmond etc. R'y Co.* v. *Norment*, 10 Id. 835.

STRAWBRIDGE *v.* BRADFORD.

[128 PENNSYLVANIA STATE, 200.]

NEGLIGENCE OF MINOR — PRESUMPTION. — A boy thirteen years and four months old has not attained an age when sufficient capacity to be sensible of danger and to avoid it is presumed.

CONTRIBUTORY NEGLIGENCE OF MINOR EMPLOYEE. — The capacity of a minor employee aged thirteen years and four months is the measure of his responsibility; and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger, but his employer will be held answerable.

CONTRIBUTORY NEGLIGENCE OF MINOR EMPLOYEE — QUESTION FOR JURY. — When employee aged thirteen years and four months is charged with contributory negligence, the question as to whether he had sufficient understanding to comprehend and guard against the peril he was in is for the jury under all of the circumstances of the case.

TRESPASS by a minor employee aged thirteen years and four months to recover damages for personal injuries sustained through the negligence of defendants. Verdict for plaintiff. Defendant assigns error.

Thomas Leaming, Jr., for the plaintiffs in error.

Rufus E. Shapley and Ellis Ames Ballard, for the defendant in error.

MCCOLLUM, J. There was abundant evidence to carry this case to the jury on the question of the alleged negligence of the defendants in failing to provide a reasonably safe elevator for the uses required of the one on which the plaintiff was injured. This elevator was constructed for the purpose of carrying freight. Two sides of it were without guards of any

description. It ran in an aperture the sides of which were ten and a half inches distant from the platform, and into which, at each floor, unbeveled sills projected eight and three quarter inches. It was operated by the defendants for the double purpose of transporting their freight and their employees. From thirty to one hundred delivery-boys were required to use it, in entering and departing from the basement of the building, where they were stationed, and in passing from the basement to the upper floors in the performance of the tasks assigned them. A number of persons acquainted with the construction and use of elevators testified that this was not a reasonably safe one for the transportation of these boys, and this evidence was not answered. An unsuccessful attempt was made by the defendants to show that, in establishments like theirs, freight-elevators were generally used as this was; but there was no effort to prove that it was proper and safe to so use them. Certainly, upon this evidence, the court could not say that the defendants had discharged their whole duty, and were guiltless of negligence in the particular complained of.

It is claimed, however, that the plaintiff's own negligence contributed to his injury, and prevents a recovery, and that the court should have so instructed the jury. But it must be borne in mind that this plaintiff had not attained the age when sufficient capacity to be sensible of danger and to avoid it is presumed: *Nagle* v. *Alleghany etc. R. R. Co.*, 88 Pa. St. 35; 32 Am. Rep. 413. A boy's capacity is the measure of his responsibility; and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him, if he unwittingly exposes himself to it: *Philadelphia etc. R'y Co.* v. *Hassard*, 75 Pa. St. 367; *Crissey* v. *Hestonville etc. R'y Co.*, 75 Id. 86. When an infant who has not reached the age of discretion is charged with concurrent negligence, it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in; and this matter is ordinarily to be considered by the jury, in connection with the other circumstances of the case, and under proper instructions from the court. It is true that in *Honor* v. *Albrighton*, 93 Id. 475, it was said that "the conduct of the boy presented a case of contributory negligence"; but there is nothing in the report of the case to indicate that the question raised here was suggested or considered; and as it was distinctly ruled that the defendants

had discharged their whole duty to the plaintiff, and the act which constituted the alleged negligence was that of a fellow-servant, it was unnecessary to inquire into the conduct or ability of the plaintiff, as affecting his right to recover. The decision in *Miller* v. *Railroad Co.*, 2 Pa. Sup. Ct. Dig. 57, was by a divided court, and within the rule laid down in *Nagle* v. *Alleghany etc. R. R. Co.*, *supra*. In the present case, it was proper and important to consider the plaintiff's own testimony as to his knowledge of the elevator, and the danger to which he was exposed when riding upon it; but this, we think, was for the jury, in connection with the other evidence.

We are of opinion that the question of the alleged contributory negligence of the plaintiff was not a question of law for the court, but of fact for the jury, and that it was properly submitted.

Judgment affirmed.

NEGLIGENCE OF INFANTS. — The rule of contributory negligence is not to be applied against children as it applies against adults. Children must use ordinary care to escape injury; but ordinary care in children is that care which children of the same age, of ordinary prudence, generally exercise, under circumstances of a similar character: *Rolling Mill Co.* v. *Corrigan*, 46 Ohio St. 283; *ante*, p. 596, and note; but children employees cannot ignore the instructions of their superiors to guard themselves from apparent dangers consequent upon their employment: *Smith* v. *Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699.

CONTRIBUTORY NEGLIGENCE OF A CHILD is generally a question of fact to be left to the jury for determination: *Westbrook* v. *Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and extended note as to what negligence on the part of an infant will bar his recovery for personal injuries.

FOREPAUGH *v.* DELAWARE ETC. R. R. Co.

[128 PENNSYLVANIA STATE, 217.]

COMMERCIAL LAW — ORIGIN OF. — There is no such thing as general commercial or general common law, separate or irrespective of a particular state, or government, whose authority makes it law. Commercial law exists only in name, and the sanction given its principles by their adoption by the courts of the different states.

CONFLICT OF LAWS. — DISTINCTION BETWEEN BINDING EFFECT OF DECISIONS ON COMMERCIAL LAW, and on statutes made by the supreme court of the United States, is utterly untenable. The law declared by state courts to govern on commercial contracts made within their jurisdiction is conclusive everywhere, and just as binding as decisions on statutes.

CONFLICT OF LAWS. — VALIDITY OF A CONTRACT SHOULD BE DETERMINED by the laws of the state in which it was made and was to be performed.

CONFLICT OF LAWS. — Courts will enforce contracts valid by the laws of the state or country wherein they were made, unless they are injurious to the interests of the citizens of the state wherein the remedy is sought.

CONFLICT OF LAWS. — A contract made with a common carrier in New York, and to be performed in that state, releasing the carrier from responsibility for negligence, will be enforced in this state; and if no recovery can be had under such contract in New York, none will be permitted in the courts of this state.

John G. Johnson and John A. Brown, for the plaintiff in error.

Lawrence, Lewis, Jr., Hampton L. Carson, and J. Bayard nry, for the defendant in error.

MITCHELL, J. Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars, upon certain conditions and terms, elaborately set out in writing, among which was a stipulation that in consideration that the service was to be performed "for much less than the ordinary, usual, and legal rates charged other parties for a like amount of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage, or injury to any of the animals, property, or things thus transported, "although such loss, damage, or injury may be caused by the negligence of the [defendant], its agents or employees." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question before us is, whether it can be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained: *Cragin* v. *New York C. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Mynard* v. *Syracuse etc. R. R. Co.*, 71 N. Y. 180; *Wilson* v. *New York etc. R. R. Co.*, 97 Id. 87. Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding, and in the absence of any statute in New York expressly authorizing such a contract, the courts of this state must follow their own views of the commercial as part of the general common law, though dif-

ferent views may be held as to such law by the courts of New York.

This is the main argument of the plaintiff, and as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from and irrespective of a particular state or government whose authority makes it law. Law is defined as a rule prescribed by the sovereign power. By whom is a general commercial law prescribed? and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest-reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same, and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a state, or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction, it is not law at all; with such sanction, it is law without reference to its origin or the concurrence of other states or people. Such sanction it is the prerogative of the courts of each state itself to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law.

It is universally conceded that, as to statutes, the decisions of the state courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law, for what the latter determine, equally with the former, is the law of the particular state. The law of Pennsylvania consists of the constitution, treaties, and statutes of the United States, the constitution and statutes of this state, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences, and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania court. To take a familiar illustration: In the United States,

the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The court of chancery of New Jersey, in *Robeson* v. *Pittenger*, 13 N. J. L. 57 (1838), 32 Am. Dec. 412, held that the same doctrine was part of the common law of New Jersey. The supreme court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles, but proceeding cautiously from the *dictum* of Rogers, J., in *Hoy* v. *Sterrett*, 2 Watts, 331 (1834), 27 Am. Dec. 313, to the unanimous decision of the court in *Haverstick* v. *Sipe*, 33 Pa. St. 368 (1859), held that the doctrine of ancient lights by prescription was not part of the common law of Pennsylvania. No tribunals of any other state presume to question that the common law of New Jersey and the common law of Pennsylvania differ on this point. What is law in one state is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective states. And though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law than if it had been made so by statute.

I have purposely selected an illustration from the law relating to real estate, because if I took one from the commercial law, it might seem like assuming the very question under discussion. But the example is none the less pertinent. The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a state stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is, that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute, because a different construction seemed to it nearer the true intent of the legislative language, and this, it is universally conceded, no foreign court can do. There is no difference in principle. The decisions of a state court upon its common law and on its statutes must stand unquestioned, because it is the only authority competent to

decide, or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusion.

It is not probable that the doctrine of such a distinction would ever have got a foot-hold in jurisprudence, and it would certainly have been long ago abandoned had it not been for the unfortunate misstep that was made in the opinion in *Swift* v. *Tyson*, 16 Pet. 1. Since then, the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose. It is argued now that, as to such questions, the state courts also have similar liberty. It would be sufficient answer to this argument that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is, in principle and in practical effect, impairing the obligation of the contract, which even the sovereign power of a state is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists:—

"Questions growing out of contracts made and to be performed in a state are decided by the national court of last resort, not in accordance with the unwritten or customary law of the state where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The state courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. . . . . Whether a recovery shall be had on a promissory note, which has been taken as collateral security for an antecedent debt, against a maker from whom it was obtained by fraud, is thus made to turn, in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. . . . . The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the

English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality. . . . . The several states of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters, through their representatives in the local legislatures, expressly, or by long-continued acquiescence in the rules enunciated by their judges, it cannot be set aside by Congress short of an amendment of the constitution. Had the New York legislature declared that notes made and negotiated in that state should follow the rule laid down in *Coddington* v. *Bay*, 20 Johns. 637, 11 Am. Dec. 342, the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this respect than the legislative": Hare on Constitutional Law, 1107, 1117; and see Lecture 51, *passim*.

We conclude, therefore, that the distinction between the binding effect of decisions on commercial law, and on statutes, is utterly untenable; that the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere, and the departure made by the United States courts is to be regretted, and certainly not to be followed.

In entire accordance with this view are our own cases of *Brown* v. *Camden etc. R. R. Co.*, 83 Pa. St. 316; and *Brooke* v. *New York etc. R. R. Co.*, 108 Id. 530; 56 Am. Rep. 235; and the decisions in Ohio: *Knowlton* v. *Erie R'y Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; in Illinois: *Pennsylvania Co.* v. *Fairchild*, 69 Ill. 260; *Milwaukee etc. R. R. Co.* v. *Smith*, 74 Id. 197; in Iowa: *Talbott* v. *Merchants' Dispatch Co.*, 41 Iowa, 247; 20 Am. Rep. 589; *Robinson* v. *Merchants' Dispatch Co.*, 45 Iowa, 470; in Connecticut: *Hale* v. *New Jersey Navigation Co.*, 15 Conn. 539; 39 Am. Dec. 398; in Kansas: *Atchison etc. R. R. Co.* v. *Moore*, 29 Kan. 632; in South Carolina: *Bridger* v. *Asheville etc. R. R. Co.*, 27 S. C. 462; 13 Am. St. Rep. 653; in Georgia: *Atlantic etc. R'y Co.* v. *Tanner*, 68 Ga. 390; in Mississippi: *McMaster* v. *Illinois Cent. R. R. Co.*, 65 Miss. 271; 7 Am. St. Rep. 653; in Texas: *Canter* v. *Bennett*, 39 Tex. 203; *Ryan* v. *Missouri etc. R'y Co.*, 65 Tex. 13; 57 Am. Rep. 589; and per-

haps in other states. I will not notice them in detail further than to quote the terse and forcible summary made by Scott, J., in *Knowlton* v. *Erie R'y Co.*, *supra:* "As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract and in respect to the manner of its execution cannot be affected by the laws or policy of other states. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio."

Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the courts of that state, is there any reason why the courts of this state should not enforce it? The general rule is, that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the state or of its citizens: Story on Conflict of Laws, secs. 38, 244. The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy: 2 Kent's Com. 458; *Greenwood* v. *Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Bliss* v. *Brainard*, 41 N. H. 256. But this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this state: *Ralph* v. *Brown*, 3 Watts &. S. 395; *Wood* v. *Kelso*, 27 Pa. St. 243; *Irvine* v. *Barrett*, 2 Grant Cas. 73.

The contract in the present case does not directly affect the state or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the state that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers, and the case of *Coup* v. *Wabash etc. R'y Co.*, 56 Mich. 111, 56 Am. Rep. 374, is a strong authority for that position. But without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that, even if it would not have been valid if made here, its enforcement as a New York contract

does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the state, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce.

The argument of duress may be briefly dismissed for want of any evidence in the case to sustain it. There is no evidence that defendant was unwilling to accept the ordinary and usual rates for the transportation of plaintiff's cars and property. If they had been offered by plaintiff and refused, there might have been some ground for the present argument, though in view of the peculiar nature of the property and the special facilities required, even that is far from clear. But in fact plaintiff got a large reduction of rates, and part of the consideration for such reduction was the agreement that he should be his own insurer against loss by accident. There was nothing compulsory about such a contract, and plaintiff comes now with a very bad grace to assert a right that he expressly relinquished for a substantial consideration.

The learned court below was right in entering judgment for the defendant on the facts found in the special verdict.

Judgment affirmed.

WILLIAMS, J., dissented, saying: "I dissent from the judgment in this case, because I cannot agree that a well-settled rule of public policy of this commonwealth must give way to considerations of mere comity. The contract set up as a defense to this action is a release to a common carrier from liability for its own negligence. It is well settled in this state that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus*, when not subversive of the public policy of our own state. This has been distinctly held by the court of appeals of New York, in which this release was executed, and in whose behalf comity is asked. I would follow the court of appeals, because comity can require no more of us in any given case than the courts of the place of the contract would yield to us for comity's sake; and because I believe the rule to rest on solid ground." Mr. Justice Sterrett concurred in this dissent.

CONFLICT OF LAWS — STATE COMITY. — A state is not bound by comity to give effect to the laws of a sister state, when such laws are repugnant to the policy of its own laws: *Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749, and cases cited in note; *Greenhow* v. *James*, 80 Va. 636; 56 Am. Rep. 603, and note 607–610; *Short* v. *Galway*, 83 Ky. 501; 4 Am. St. Rep. 168, and note.

CONFLICT OF LAWS. — A contract valid where made will be enforced in another state, provided it is not clearly contrary to good morals, or repugnant to the policy of the laws of such state: Cases cited in note to *Robinson* v. *Queen*, 10 Am. St. Rep. 698.

DECISIONS OF STATE COURTS to govern on contracts made in such states are conclusive elsewhere: *Bridger* v. *Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653; *McMaster* v. *Illinois Central R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note; note to *Attrill* v. *Huntingdon*, 14 Id. 353, 354. But unless the act causing an injury is actionable in the state where committed, no action can be maintained therefor in another state: *Carter* v. *Goode*, 50 Ark. 155; *Buckles* v. *Ellers*, 72 Ind. 220; 37 Am. Rep. 156, and extended note.

LEHIGH ETC. COAL COMPANY *v.* HAYES.

[128 PENNSYLVANIA STATE, 294.]

MASTER AND SERVANT — MASTER'S DUTY TO FURNISH SAFE MACHINERY. — An employer is not bound to furnish his workmen with the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use; and if the machinery is such as is ordinarily used by persons in the same business, and such as can, with reasonable care, be used without danger to the employee, that is all that is required of the employer, and is the limit of his responsibility.

MASTER AND SERVANT — NEGLIGENCE OF MINOR EMPLOYEE. — An infant employee nearly fourteen years of age is bound to avoid a danger which he knew was likely to occur immediately, and the master is not bound to warn him of such danger.

CASE to recover damages for personal injuries resulting in death to a boy nearly fourteen years old employed in defendant's mine. The accident resulted from drawing a car loaded with coal from the chute where the deceased was at work, and negligence is alleged against defendant. Verdict for plaintiff. Defendant assigns error.

Andrew H. McClintock and Henry W. Palmer, for the plaintiff in error.

William S. McLean and William R. Gibbons, for the defendant in error.

GREEN, J. Upon the trial of this cause, no evidence was given by the plaintiff to show that the defendant's breaker and the machinery used in crushing and screening coal was, in any manner, defectively built, or that it was not built in the same manner and with the same appliances as are used in all similar structures. The single act of negligence in this regard alleged against the defendant was, that it had no appliance and used no means or method by which warning could be given to persons working in the pocket that a draw was about to be made. No evidence was given to show that

it was customary among coal operators to give any such warning in the conduct of their collieries. It follows that there was no proof that the defendant neglected any of the precautions which were usually observed in carrying on the business of crushing, screening, and shipping coal. But the defendant did give testimony of importance upon this subject. G. M. Williams, the mine inspector for the district in which this colliery was situated, testified that there were sixty-two collieries or openings altogether in the district, and that this breaker, with its chutes and pockets, was constructed in the usual, ordinary way in which such breakers are constructed in that region. He also said he did not know that there was in use, in any of the collieries of the district, any signaling apparatus to indicate when coal is about to be drawn out of a chute to be lowered into a car. Joseph Tyrell, another witness, whose business was building breakers, and who built this one, testified that the breaker was built in the usual way in which breakers are built in that region, and that he knew of no breaker in the region in which, prior to this accident, any apparatus or device was used to signal before coal was drawn from the chute into cars. There was affirmative testimony, therefore, that this breaker was built in the usual way in which all breakers were built in that district, and that there was no custom or use, known to the witnesses, of having appliances of any kind to signal the drawing of coal from the chutes. Against this there was no opposing testimony whatever.

The rule in regard to the obligation of the employer respecting the character of the tools and appliances furnished by him has been repeatedly stated in the recent decisions of this court. Thus in *Pittsburgh etc. R. R. Co.* v. *Sentmeyer*, 92 Pa. St. 276, 37 Am. Rep. 684, we said that when the employer furnishes his employees "with tools and appliances which, though not the best possible, may, by ordinary care, be used without danger, he has discharged his duty, and is not responsible for accidents." In *Payne* v. *Reese*, 100 Pa. St. 301, we said: "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer; this is the limit of his responsi-

bility and the sum total of his duty." In *Allison Mfg. Co.* v. *McCormick*, 118 Pa. St. 519, 4 Am. St. Rep. 613, we said: "The general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis, in order to settle by experiment what remote and possible hazard may be incurred by their use." In *Iron Ship-building Works* v. *Nuttall*, 119 Pa. St. 149, we held that the employer was under no obligation to give warning to his employee of the dangerous character of a circular saw, or to provide it with a spreader to prevent accidents. As to the spreader, we said: "The testimony shows that such an attachment is not in general use, and that there is no general agreement among mill-owners or practical sawyers that it is a desirable or a useful attachment. It is not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test, the saw of the defendant is such a one as the company had a right to use, because it is such as is commonly used by mill-owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader."

Applying these principles to the facts of the present case, we fail to discover any evidence of negligence on the part of the defendant, so far as the character of the breaker and its appliances is concerned, and hence we can find nothing upon which to support a verdict for the plaintiffs. It was argued that the defendant should have given a warning to the deceased that the coal was about to be drawn, but in view of the fact that the plaintiffs gave evidence tending to show that the boy sent out word that they should draw the coal, he being at that time in the chute, the necessity for any such warning does not appear. It was a matter of no consequence, so far as he was concerned, whether his message was communicated to the parties outside or not. He at least was bound to avoid a danger which he must have had knowledge was likely to occur immediately. We think a verdict for the defendant should have been directed upon all the testimony. We sustain the first, second, third, seventh, and eighth assignments.

Judgment reversed.

DUTY OF MASTER TO PROVIDE SAFE MACHINERY, ETC., FOR HIS SERVANTS. — The master need only furnish such materials for the use of his servants as are used generally by persons in the same kind of employment;

he is not bound to furnish the best known materials: *Allison Mfg. Co.* v. *McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613; note to *Buzzell* v. *Laconia Mfg. Co.*, 77 Am. Dec. 222; cases cited in the dissenting opinion of Sherwood, J., in *Marshall* v. *Widdicomb F. Co.*, 67 Mich. 167; 11 Am. St. Rep. 576, 577.

MINOR EMPLOYEES CANNOT IGNORE THE DUTIES of common prudence in guarding themselves from apparent dangers consequent upon their employment: *Smith* v. *Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699.

AS TO WHAT DEGREE OF CARE may be reasonably expected of minors between the ages of seven and fourteen years, see note to *Westbrook* v. *Mobile etc. R. R. Co.*, 14 Am. St. Rep. 592 et seq.

DIXON *v.* WHITE SEWING MACHINE COMPANY.

[128 PENNSYLVANIA STATE, 397.]

EXECUTION — VALIDITY OF LEVY. — A levy made in sight or within potential control of the goods is valid only when followed by possession within a reasonable time.

EXECUTIONS — LEVY OF, WHEN A TRESPASS. — The interest of an execution debtor in goods bailed or demised by him may be seized and sold, but a levy upon the goods in the possession of the bailee is such a disturbance of his possession as constitutes a trespass, whether the goods were actually taken or not.

EXECUTIONS — POSSESSION NECESSARY TO MAINTAIN TRESPASS FOR LEVY. — In order to maintain trespass for a levy on goods in the possession of a bailee, it is necessary that the plaintiff be in actual possession of the goods, or have the right of possession, at the time of the trespass, but after the sale of the goods the action may be maintained upon a reversionary or conditional right of possession.

EXECUTIONS — OFFICER'S RIGHT TO ALTER HIS LEVY AND RETURN. — An officer, after having levied upon goods, upon claim being made to them by a stranger, may either abandon the levy or restrict it to the defendant's interest, and he may alter his levy and return accordingly, provided the latter is appropriate in form and sufficient in law.

EXECUTIONS. — OFFICER'S CONTROL OVER HIS RETURN lasts as long as the writ remains in his hands; but the effect of delaying the return until after the return day is to destroy the presumption to which it is ordinarily entitled in the officer's favor.

TRESPASS against Dixon, as sheriff, in executing a writ of *fieri facias* against one Dinkle. No actual levy was made, but the officer went to the residences of persons who held possession of organs obtained from Dinkle on rental contracts, and informed them that he levied on the organs as the property of Dinkle. Upon his return to his office, his deputy indorsed on the writ the levy on the organs. Notice was afterwards served on him that the White Sewing Machine Company owned the organs, and he added to the indorsement on the writ the words

"the interest of W. H. Dinkle in," which interest was afterwards sold. No return of the sale was made until the trial of the present action, when return was made stating that only the interest of Dinkle had been sold. The organs were not delivered to the purchasers, nor does it appear that they ever took possession. Judgment for plaintiff. Defendant assigns error.

S. Hepburn, Jr., J. W. Wetzel, and S. Hepburn, for the plaintiff in error.

John Hays and R. M. Henderson, for the defendant in error.

MITCHELL, J. The common-law requirement of a valid levy, that the sheriff shall take actual possession of the goods, has been relaxed in Pennsylvania to a degree that has been regretted by the judges of this court: *Cowden* v. *Brady*, 8 Serg. & R. 510; *Schuylkill County's Appeal*, 30 Pa. St. 359; but none of the cases have gone further than to hold that a levy in sight or within potential control of the goods will be valid only when followed up by actual possession within a reasonable time: *Cowden* v. *Brady, supra; Commonwealth* v. *Stremback*, 3 Rawle, 345; 24 Am. Dec. 351; *Commonwealth* v. *Contner*, 18 Pa. St. 445; *Schuylkill County's Appeal*, 30 Id. 358; *Welsh* v. *Bell*, 32 Id. 12. The levy in the present case, therefore, could scarcely be considered a perfected levy, if it had maintained its initial character as a levy on the organs themselves in the possession of the contract vendees. But there are cases which hold that it was a sufficient interference with the possession of the owner to support an action of trespass: *Paxton* v. *Steckel*, 2 Id. 93. "A levy on the goods of a stranger to the execution is an exercise of dominion over them sufficient to constitute a trespass, though there be no actual taking of the goods,—though they be not touched. . . . . If the debtor have bailed or demised the goods, his interest may be seized and sold, ... but the possession of the bailee may not be disturbed. A levy on the thing itself disturbs the possession, and is a trespass": *Welsh* v. *Bell*, 32 Id. 16.

But it is the person whose possession is disturbed to whom the right of action accrues. "To maintain trespass it is absolutely necessary that plaintiff must be in actual possession or have the right of taking possession at the time of the trespass": *Ward* v. *Taylor*, 1 Pa. St. 238. Thus in *Srodes* v. *Caven*, 3 Watts, 258, the action was by the bailee for taking from

him property which he had hired, and *Welsh* v. *Bell*, already cited, was supported expressly on the ground that the jury found the plaintiff had not parted with the possession.

Tested by these principles, the original levy, though upon the organs themselves, gave plaintiff no cause of action. Whatever the plaintiff company's title might have been, it is clear that it had no right of possession at the time of the levy, or at any time before the sheriff's sale. The organs had been sold by Dinkle, and delivered to the purchasers upon contracts for payment in installments. There is no evidence, nor is it claimed, that any installments were due and unpaid, or that either Dinkle or the plaintiff had any right of resuming possession in the absence of default in the payments. So far as the evidence shows, even the purchasers could not have claimed anything more than nominal damages: *Watmough* v. *Francis*, 7 Pa. St. 216; and plaintiff had no ground of complaint at all.

But Dinkle, either for himself, or as agent of plaintiff, had still a title in the organs, to which a reversionary and conditional right of possession attached, and a sale of the goods themselves by the sheriff would be such an interference with this title and consequent right of possession as would support an action. Assuming, therefore, for the present, that plaintiff's title through Dinkle was valid, we have to consider the right of the sheriff to change his levy, and the steps he took in doing so.

The general right of the sheriff to change his levy, to enlarge, or restrict, or abandon it, is unquestionable. Having made a mistake, he is not bound to persevere in it. If he withdraws or abandons the levy, it is absolutely discharged, even though his action was improper, and he thereby became liable to the plaintiff in the execution: *Commonwealth* v. *Contner*, 18 Pa. St. 445; and having levied on goods themselves, he may, upon claim by another, either abandon it, or restrict it to the defendant's interest: *Patterson* v. *Anderson*, 40 Id. 363; 80 Am. Dec. 579. This is what the sheriff did in the present case. When he made the levy he does not seem to have been aware of plaintiff's interest in the organs, and he accordingly levied on them as the property of Dinkle. On being informed of plaintiff's claim, he changed his levy by reducing it to Dinkle's interest in the organs. It is true, he did not notify the purchasers in possession of this change, but they are not here complaining of omission, and, as already seen, they are

the only ones whose rights were interfered with by the levy itself in either form.

In accordance with his action in changing the character of the levy, the sheriff also changed his return. His right to do so is equally beyond question. The effect of so doing is another matter. The sheriff, as the executive officer of the court, is charged with the duty of making return to the mandates of its writs, but what return he shall make is within his own control. The court cannot dictate what it shall be: *Vastine* v. *Fury*, 2 Serg. & R. 426; *Maris* v. *Schermerhorn*, 3 Whart. 13. It can only require that it shall be in form appropriate to the writ, and as matter of law sufficient; and this control of the sheriff lasts as long as the writ is in his hands. The right to alter his levy, as affirmed in *Patterson* v. *Anderson*, *supra*, necessarily carries with it the right to make a corresponding alteration in his return, if it should happen to be previously written. In *Schuylkill County's Appeal*, 30 Pa. St. 358, it is reported that the sheriff "made return," and afterwards, but before return day, made a new levy, sale, and new return. Whether the expression "made return" means that the writ was actually returned into the court office, is doubtful; but until such actual return, the right of the sheriff to alter his indorsement on the writ is beyond question. It is the final act of filing it in court that fixes his official return.

In the present case, the return was not changed on the back of the writ until long after the return day, and after the commencement of this action, and was not actually filed in court until the day of trial. This, however, was but an irregularity. In *Mentz* v. *Hamman*, 5 Whart. 154, 34 Am. Dec. 546, it is said that "the sheriff is not obliged, unless ruled so to do, to make a return to a writ of *fieri facias*"; and while this is meant, probably, as a statement of the practice rather than of the law, it is sufficient to show that the delay does not lessen the sheriff's control over his return, so long as the writ actually remains in his hands. The effect of delaying the return until *post litem motam* is to take away the presumption to which it is ordinarily entitled in the sheriff's favor.

The change, therefore, in the levy and the return being within the sheriff's privilege, and being made under circumstances which gave the plaintiff no right to complain, we have left only the sale, and this, it is quite clear, was of Dinkle's interest only. The testimony of Dinkle on this point is somewhat confused, but tends rather towards a sale of his interest

only, and the same may be said of the testimony of the sheriff himself; for although he says, in a general way, that the organs were sold, he also says that his return will show precisely what was done, and that the sale was held by the undersheriff, it not appearing that the sheriff himself was even present at all. But the testimony of Spencer, the deputy sheriff who made the sale, is conclusive that only the interest of Dinkle was sold.

It being thus clear that plaintiff below had no present right of possession which could be disturbed by the levy, and the sale, being only of Dinkle's interest, did not interfere with plaintiff's title, whatever it was, it follows that, under the evidence, plaintiff had no cause of action, and defendant's sixth point should have been affirmed.

As this is decisive of the whole controversy, it is not necessary to consider the other questions raised.

Judgment reversed.

WHAT CONSTITUTES A VALID LEVY under an execution: *Sawyer* v. *Bray*, 102 N. C. 79; 11 Am. St. Rep. 713, and note.

BAILEE OF PERSONAL PROPERTY may maintain an action of trespass against one who takes possession of such property against his will, unless it be the owner of the property: Note to *Orser* v. *Storms*, 18 Am. Dec. 550.

SHERIFF'S RETURN TO AN EXECUTION may be amended by leave of court even after an action has been commenced against the sheriff for making a false return: *People* v. *Ames*, 35 N. Y. 482; 91 Am. Dec. 64, and note; and note to *Malone* v. *Samuel*, 13 Id. 173 et seq., as to amendment of returns to writs in general.

WESTERN UNION TELEGRAPH CO. *v.* STEVENSON.

[128 PENNSYLVANIA STATE, 442.]

EVIDENCE — TRANSACTIONS BY TELEGRAPH. — Where a telegraph company contracts to furnish an oil broker with accurate quotations of prices of oil, and to transmit his messages for purchases and sales, he may show, when sued on the contract, the quotations furnished and directions given in reliance thereon; and his testimony as to purchases and sales made under such directions, at places where he was not personally present, is admissible, and cannot be excluded under the rule requiring the production of the best evidence, as the purpose of that rule is to exclude evidence merely substitutional.

TELEGRAPH COMPANIES — WAIVER OF CONDITIONS. — A rule printed on a telegraph company's blanks restricting its liability for the accuracy of messages transmitted to such as are repeated, is reasonable, and binding upon one sending a message with knowledge of it, unless it is waived by the company. If the company receives and delivers messages orally, it then becomes a question for the jury, under the evidence and circum-

stances of the case, whether the company, by dispensing with the use of blanks, did not intend to relieve its patrons from the stipulations contained therein.

TELEGRAPH COMPANIES — LIABILITY FOR INACCURATE MESSAGE. — Where a telegraph company has contracted to furnish an oil merchant with quotations of the price of oil, he has a right to rely upon their accuracy, and the company is liable to him for any loss resulting to him from an inaccurate quotation received and acted upon.

ASSUMPSIT to recover a balance claimed on account for messages sent and received. Plea, *non assumpsit*, payment, and set-off. Verdict for plaintiff, deducting the set-off. Judgment accordingly, and plaintiff assigns error.

J. B. Chapman, *Silas W. Pettit*, *and W. B. Chapman*, for the plaintiff in error.

J. W. Lee, *F. W. Hastings*, *and G. S. Criswell*, for the defendant in error.

CLARK, J. The defendant, C. P. Stevenson, at the time the matters involved in this suit occurred, was a member of the Bradford Oil Exchange, and was engaged in buying and selling oil on his own account and as a broker for others. The Western Union Telegraph Company, for a certain stipulated sum per month, agreed to furnish him accurate quotations of the price of oil from the exchanges in New York and Oil City. The oil market, being exceedingly sensitive, was subject to the most frequent, indeed almost momentary, changes; and these changes, it would seem, varied slightly in the various markets, so that a person might at times, by carefully noting the quotations, buy in one market and sell in another. Transactions in the exchange were very rapid, and were noted generally upon mere memoranda until the close of the day's business. Success in buying oil in one market, to sell in another at a profit, therefore, rested wholly in the accuracy of these quotations, upon which the dealer is necessarily obliged to depend.

Acting upon these quotations, the defendant had various transactions in the purchase and sale of oil, which were conducted by telegrams transmitted over the plaintiff's lines, for which telegrams he paid or agreed to pay at certain specified rates. In establishing his set-off, the defendant certainly had a right to show what quotations were given him by the company from the New York and Oil City exchanges, and what he did relying upon their accuracy; that he dictated certain messages for transmission over the company's lines, directing

the purchase and sale of oil by his agents, and received from the operators of the company certain messages in reply. The correspondence was notice to the company that the defendant acted upon the quotations given. When the defendant says that he bought or sold a certain number of barrels of oil in Oil City or New York, he states that he was not present in those places at the time, but that he directed such purchase or sale by telegram over the company's wires. What he speaks of doing in Oil City or New York, he admits that he merely directed to be done; but he afterwards states that he knows what he directed to be done was done, for the oil bought or sold was actually delivered, the various transactions settled, and the money received or paid out in accordance with his directions. The testimony of the agents who effected each of the several sales and purchases of oil, or of those with whom the agents dealt, would doubtless have afforded more direct proof of the fact, but it would have been proof of the same grade offered. The defendant testified to what he personally knew, and of which his agents were probably ignorant; he testified to the consummation of the contracts which his agents reported through the plaintiff they had made.

In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information; but where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not impinged: Greenl. Ev. 82. The warden of a penitentiary would perhaps be able to give the strongest proof that a person had been, at a particular time, a convict imprisoned in the penitentiary, as he keeps a registry in which is noted the exact time of the admission and discharge of the convict; but the fact may be shown by any other competent proof: *Howser* v. *Commonwealth*, 51 Pa. St. 332.

The date of a birth or death, or of a marriage, could best be established by a person present at the event, but any other legal proof is admissible for the purpose. Handwriting may be proved by another, without calling the writer; or a sale of oil or of any other commodity may be shown by the acts or declarations of the parties, although a witness may have been actually present and fully conversant with the whole transac-

tion. As between living witnesses, one is not to be excluded because another had a better opportunity of knowing the fact alleged and attempted to be shown. We are of opinion, therefore, that the evidence of the defendant, although perhaps not the strongest proof, was sufficient to send the case to the jury on the questions raised by the defense.

The defendant alleges, as the first matter of the defense to the plaintiff's claim, by way of set-off, that on the morning of the 8th of July, 1885, he had on hand about ninety-seven thousand barrels of oil; that the market at first advanced, and he bought forty thousand more; that the market then indicated a break, and he gave to the company a verbal message to his agent at Oil City to sell fifty thousand barrels at 97¾; that the company failed to send the message as directed, but, instead, negligently sent a message to the agent to buy fifty thousand at that price; the market price being about 97 to 97¼. He says he called the company's attention to the error at the time, and that his actual loss in the transaction was $178.75. That the order dictated to the messenger was an order to sell and not to buy is established by the verdict of the jury, and the case must be considered upon the assumption of this fact. As against this claim of the defendant, the plaintiff interposes the rule of the company printed at the head of their message blanks, to the effect that "the company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," etc.

That the company may make reasonable rules, not inconsistent with the public good, affecting the measure of their responsibility in the ordinary course of telegraphy, is settled in *Passmore* v. *Western Union Tel. Co.*, 78 Pa. St. 239. In that case this court held, adopting the language of Judge Hare, that the rule or regulation now in question was not so far contrary to private interests or the public good as to justify a court of justice in pronouncing it invalid. "A railway, telegraph, or other company," says the learned judge, "charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare, if these are not observed, that the injured party shall be considered in default, and precluded by the doctrine of contributory negligence." In the case at

bar, however, the ordinary blanks upon which these regulations and restrictions were printed were not used, and the manner of conducting the business was somewhat peculiar The great number and variety of the transactions, and the rapidity with which they were necessarily conducted, gave occasion for a large amount of telegraphic communication of a complex character. Momentary changes in the market demanded the utmost dispatch in telegraphic communication; written messages were dispensed with in the business of the exchange. All the messages were given to the operator verbally; not one in a thousand was written. The members of the exchange, standing about the ring, whispered the messages they wished to send into the ear of a messenger-boy employed by the company, and he communicated the message to the operator. For a part of the time they were conveyed through a speaking-tube from the defendant's room to the ear of the operator. The exigencies of the business were such as to require that the usual methods of procedure should be dispensed with; there was not time to write the messages. The company would appear to have undertaken to transmit these messages correctly without reducing them to writing, either at the place of reception or delivery; the company received them orally, and delivered them orally. The business, as it was conducted in the exchange, compared with the general and ordinary business of the company, was special and peculiar, and it was a question for the jury whether or not, under the circumstances, the company, by dispensing with the use of the blanks, did not intend to relieve their patrons from the stipulations contained therein. Such an inference might fairly be drawn from the extraordinary manner in which the business was conducted. We cannot say there was no evidence to justify such an inference. If there was a rule of the company by which its responsibility for the accuracy of messages transmitted over its lines was restricted to such as were repeated, and that any claim for damages must be made in writing, within sixty days, the defendant was bound by such rules, if he had any knowledge of them, and they had not been waived or dispensed with by the company in its dealings with the defendant. These were questions of fact which were properly submitted to the jury.

The defendant further claims damages sustained by reason of a misquotation of the market at Oil City. On August 3, 1885, oil at Oil City was quoted to the defendant at ninety-nine and a fraction. Relying upon the accuracy of this quo-

tation, the defendant ordered his agent at Oil City to sell ninety thousand barrels. It turned out, however, that the quotation furnished was inaccurate, and the loss was $713.35. As the company had contracted to furnish the defendant the quotations of the New York and Oil City markets, it was bound to furnish them with accuracy, and the defendant was justified in relying upon them. The questions bearing upon this branch of the case have already been considered, and we do not wish to repeat what has been said.

We thing the learned judge of the court below was right in his instructions to the jury, and the judgment is affirmed.

TELEGRAPH COMPANIES undertake to serve the public, and must perform their duties and comply with their contracts in good faith; and a failure to discharge their functions with reasonable care renders them liable in damages for losses and injuries that may be traced directly or with reasonable certainty to their negligence: *Alexander* v. *Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556, and note 564.

RENNINGER *v.* SPATZ.

[128 PENNSYLVANIA STATE, 524.]

FRAUDULENT CONVEYANCES — SUFFICIENCY OF DELIVERY OF POSSESSION. — Where the purchaser of a farm at judicial sale takes possession, and afterwards purchases the personalty thereon from his vendor, and leases it to the vendor's wife, who, with her husband, and without removing the property, remains on the farm, the husband being hired as a laborer by the vendee, it cannot be ruled, as matter of law, that the delivery of possession of the personalty is insufficient as against the vendor's creditors; but that question, as well as the good faith of the transaction, is one for the jury.

FRAUDULENT CONVEYANCES — SUFFICIENCY OF DELIVERY OF POSSESSION. — A sale of personalty is not good as against the creditors of the vendor, unless possession is delivered in accordance with the sale; but in determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, position of the parties, and intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required.

FRAUDULENT CONVEYANCES — FRAUDULENT PURCHASER. — Where a debtor, with intent to defraud his creditors, sells his property to a purchaser with knowledge of such intent, the sale is void, and the title of the purchaser worthless as against the creditors of the vendor, though he may have paid full value.

N. Franklin Hall and William R. Wilson, for the plaintiff in error.

Aaron W. Snaaer and Philip D. Baker, for the defendant in error.

McCOLLUM, J. At a judicial sale of the farm of William D. Snader, on the 10th of September, 1887, John H. Spatz became the purchaser. There is evidence tending to show that very soon thereafter he took possession and control of the farm, and hired Snader to work upon it; that he leased the house upon it to Mrs. Snader until April 1, 1889; and that he bought of Snader the personal property in dispute, and leased it to Mrs. Snader for a period corresponding with a lease of the house. Mrs. Snader is a sister of Spatz. C. B. Renninger, being a creditor of Snader, and having a judgment against him, caused an execution to be issued and levied upon the personal property which Mrs. Snader received under the lease.

It is claimed by Renninger that this property was never delivered to Spatz, and that the sale to him was made with the intent to defraud the creditors of the vendor. As was said by this court in *Crawford* v. *Davis*, 99 Pa. St. 576, "the general rule is, that a sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. In determining the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required." To the same effect is *Evans* v. *Scott*, 89 Id. 136, and the cases there cited to support it.

In this case, the property which was the subject of the sale was on the farm of the vendee, and intended by him for use there. It was placed in the custody of his tenant by a lease, but it was not removed from the farm. It is true that the lessee of the property was the wife of the vendor, and that they dwelt together after the sale as before; but she rented the house in which they lived, and he was a hired man on the farm, while Spatz owned and had the exclusive possession and control of it.

We are of opinion that the learned judge did not err in refusing to hold, as matter of law, that the delivery of possession was insufficient. It was for the jury to find, from the evidence, whether the sale was in good faith or colorable, and

whether the "change of possession was all that could reasonably be expected of the vendor, taking into view the character and situation of the property, and the relations of the parties": *Evans* v. *Scott*, *supra*.

The defendant's second point should have been affirmed, and its denial was palpable error. It called on the court to instruct the jury that if Spatz paid full value for the property, and the object of the sale was to defraud Renninger, or the intention of the parties was to hinder and delay him in collecting his claim against Snader, the sale as to Renninger was void. To this point, the learned judge replied: "If the jury believe that Spatz gave or paid value for this personal property he claims, the sale is not void as against Renninger, the defendant in this issue, and he is not entitled to your verdict." This answer was equivalent to a direction to find for the plaintiff, if he paid full value for the property. It withdrew from the jury the question of actual fraud by saying, in effect, that it amounted to nothing if a full price was paid for the goods.

In *Covanhovan* v. *Hart*, 21 Pa. St. 495, 60 Am. Dec. 57, the rule on this subject was well stated by Chief Justice Black, when he said: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he of course commits gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless as against creditors, though he may have paid a full price." The point was pertinent, and the question raised by it was for the jury. Snader had testified that the sale was made to prevent Renninger from attaching or levying upon the goods. Here was a confession by the vendor of a fraudulent purpose in making the sale. Did Spatz have knowledge of it, and aid and assist Snader in carrying it out? If so, he took no title to the goods as against Renninger, even if he paid full value for them. For the refusal of the defendant's second point, this judgment must be reversed. We discover no substantial error in the remaining specifications, and they are not sustained.

Judgment reversed, and *venire facias de novo* awarded.

FRAUDULENT SALE — WANT OF SUFFICIENT DELIVERY. — A voluntary sale of chattels, with an agreement that the vendor may keep possession, is ordinarily fraudulent and void as against creditors: *Sturtevant* v. *Ballard*, 9 Johns. 337; 6 Am. Dec. 281, and note 287, 288, as to when a change of possession is necessary in a sale of chattels. And as to what change of posses-

sion is sufficient as against creditors and subsequent purchasers, extended note to *Claflin* v. *Rosenberg*, 97 Id. 340-348. In absence of immediate delivery and an actual and continued change of possession on an actual sale of chattels, the sale is *prima facie* fraudulent as against creditors, and the burden of proof is upon the vendee to show himself a *bona fide* purchaser, and that the sale was not made to defraud creditors: *Buhl Iron Works* v. *Teuton*, 67 Mich. 623; and whether there has been a delivery, and an actual, continued change of possession, depends, to a great extent, upon the kind and nature of the chattels sold, the relation of the parties, and the circumstances generally connected with the individual transaction in question: *Tunell* v. *Larson*, 39 Minn. 269; *Sweeney* v. *Coe*, 12 Col. 486. In *Hogan* v. *Cowell*, 73 Cal. 211, a sale was held valid, and to be accompanied by immediate delivery and actual and continued change of possession, where, for three months prior to the sale, the horses sold were pastured upon the vendee's ranch, and, at the time of the sale, he had full control and possession of them, and within five days thereafter moved them to another ranch owned by him, the consideration of the sale being pre-existing indebtedness equal in amount to the value of the horses sold. So in *Schumacher* v. *Connolly*, 75 Id. 282, a sale was held to have been accompanied by an immediate delivery, and an actual and continued change of possession, where a store-owner, who lived in a back room of the storehouse with his family, sold the store and its contents to one who took immediate possession thereof, and hired the vendor's wife to help him manage the business, it appearing that the vendor had nothing whatever to do with the business subsequent to the sale. But a sale may be accompanied by an immediate delivery of the chattels sold, and an actual change of possession, and still be fraudulent as against creditors, because the change of possession was not a continued change: *Ruddle* v. *Givens*, 76 Id. 457. And the general rule is, that a sale of chattels, accompanied by such open and unequivocal acts on the part of the purchaser as to give the world notice of his ownership, and show that the ownership and possession of the vendor has ceased, is a valid sale, so far as the provision is concerned, requiring sales of chattels to be accompanied by immediate delivery, and by an actual and continued change of possession: *Gould* v. *Huntley*, 73 Id. 399. In *Clinton Nat. Bank* v. *Studemann*, 74 Iowa, 104, a sale was considered valid, as against creditors, where the vendor sold and delivered certain cattle to the vendee, who immediately redelivered them to the vendor, to be cared for by him until the following Monday, and then driven by him to a certain place named by the vendee, it appearing that the sheriff who levied upon the cattle as the property of the vendor had notice of all the facts. In the case of *Oro Mining etc. Co.* v. *Starr*, 76 Cal. 166, where one purchased and paid for certain machinery, but left it on storage with the vendors, and the vendors afterwards, the machinery in question still being in their possession, sold out to defendant, who immediately went into possession under a schedule of the property bought by him, accompanied by a bill of sale therefor, which did not include the machinery left on storage, in an action by the purchaser of the machinery against the purchaser of the business, it was held that the sale of the machinery was good as against the defendant, even though such sale was not accompanied by an actual change of possession.

FRAUDULENT CONVEYANCES — KNOWLEDGE OF FRAUD BY GRANTEE OR VENDEE. — A conveyance or sale is fraudulent and void as against the creditors of the grantor or vendor, when the grantee or vendee has knowledge of the intent of his grantor or vendor to defraud his creditors: *Albertoli* v. *Branham*, 80 Cal. 631; 13 Am. St. Rep. 200, and note. A fraudulent gran-

tee is liable, in equity, to personal judgment, at the suit of the grantor's creditors, for the proceeds or value of the property fraudulently conveyed to him, where the property itself has been so disposed of or concealed by him that it cannot be reached or identified: *Solinsky* v. *Lincoln Sav. Bank*, 85 Tenn. 368. And a vendee is presumed to have made inquiry, and will be charged with a knowledge of every fact which such inquiry would give him: *Higgins* v. *Lodge*, 68 Md. 229; 6 Am. St. Rep. 437; *Lincoln* v. *Quynn*, 68 Md. 299; 6 Am. St. Rep. 446. In *Hirsch* v. *Richardson*, 65 Miss. 227, it was held that a creditor might in good faith purchase goods from his debtor in order to secure his debt, although the debtor sold to him for the purpose of defrauding his other creditors. And in *Jaseph* v. *Kronenberger*, 120 Ind. 495, where a person colluded with a debtor to defraud his creditors, taking a conveyance of property, for that purpose giving a valuable consideration therefor, and there was no money placed in the grantee's hands belonging to such debtor, and nothing owing from the grantor to the grantee, the latter was held not subject to garnishment for the debts of the grantor.

A CONVEYANCE NOT MADE IN GOOD FAITH, and for a good consideration, is voidable as to subsequent as well as existing creditors: *Romans* v. *Maddux*, 77 Iowa, 203.

KISTER *v.* LEBANON MUTUAL INSURANCE COMPANY.

[128 PENNSYLVANIA STATE, 553.]

INSURANCE — WHAT CONSTITUTES AGENT. — A party who subscribes his name to an application for insurance as agent of the company, makes a statement of the exposures, and approves the risk as agent, and after this is brought to the notice of the company, receives and delivers the policy, lifts the premium, and reports it, and then collects assessments, and gives receipts recognized by the company, is its agent in effecting the insurance.

INSURANCE — CONDITION THAT PERSON PROCURING INSURANCE BE DEEMED AGENT OF ASSURED. — A condition in a policy of insurance that "if any broker, or other person than the assured, shall have procured this insurance to be taken by the company, such broker or other person shall be considered the agent of the assured, and not of this company," has reference to parties operating on their own account, or on behalf of the assured, and not to agents representing the company in procuring insurance.

INSURANCE. — FRAUD OF AGENT or mistake on his part, within the scope of the powers given him by the insurance company, will not enable the latter to avoid a policy to the injury of the assured, who innocently became a party to the contract.

INSURANCE — FRAUD OF AGENT DOES NOT AFFECT INSURED. — Where an insurance agent has fraudulently cheated the insured into signing a false warranty and paying the premium, and the policy was issued upon the false statements of the agent, the false warranty thus procured will not avoid the policy, nor is the assured estopped from proving the fraud, and holding the company to the contract.

INSURANCE COMPANY CANNOT REPUDIATE THE FRAUD OF ITS AGENT, and thus escape liability on a policy consummated thereby, simply because the insured accepted in good faith the false representations of the agent without examination.

INSURANCE.—CONDITION AGAINST INCREASE OF ENCUMBRANCES on the insured property without notice thereof to the company is not violated by a change, but not an increase, of encumbrances known to the company at the time the insurance was effected.

ASSUMPSIT to recover on a fire insurance policy. One Strominger was authorized by the defendant company to make application and insure the property for the loss of which this action is brought. When making the application, he asked the insured a number of questions, which the latter truthfully answered, but the agent, in filling out the application, inserted false answers. Among the questions asked were: "Is it encumbered?" "To what amount, if so?" "Is the encumbrance insured?" The insured answered that the property was encumbered to the amount of four thousand dollars, some of which had been paid, but how much he did not know. In filling out the answers to these questions, the agent wrote, "None." The insured did not read his answers as put down, and was not aware of their falsity until the company's affidavit of defense alleging the falsity of the warranties was shown him. The application containing the warranties was signed by the assured. Other facts appear in the opinion. Judgment for defendant, and plaintiff brings error.

E. W. Spangler and H. L. Fisher, for the plaintiff in error.

W. Bay Stewart, Henry C. Niles, George E. Neff, Frank Geise, Edward D. Ziegler, and J. R. Strawbridge, for the defendant in error.

CLARK, J. That Strominger was the agent of the company in effecting this insurance is too plain to admit of discussion. He subscribed his name to the application as agent; he made a statement of the exposures as agent, and approved the risk as agent; and all this was brought to the immediate notice of the company before the policy issued. The company forwarded the policy to him, and he delivered it, lifted the premium, embraced it in a formal report to the company at the end of the month, deducting his commissions, and sent it to the special agent. He subsequently received all the assessments, and gave the receipts, which were recognized by the company, and were at the trial given in evidence. He was without doubt the agent of the company in this particular transaction, and must be so regarded.

The policy contains a clause as follows: "If any broker, or other person than the assured, shall have procured this insur-

ance to be taken by the company, such broker or other person shall be considered the agent of the assured, and not of this company."

It is said that the defendant is a mutual company, of which the plaintiff is a member, and he will be presumed to have known this regulation. But Kister was not yet a member of the company. The application was one of the preliminary negotiations to that end, and certainly he will not be presumed to have known in advance of a provision in a policy which had not yet issued. But according to our construction, the agents of the company are not embraced in this provision; the reference is to persons operating on their own account, or on behalf of the assured, and not representing the company in procuring the insurance. The use of the term "broker" indicates the class of persons intended. Where general words follow particular ones, the rule is to construe them as applicable to subjects *ejusdem generis*. If it was intended by the policy to provide that the company's agent, when taking an application, was not the company's agent, but the agent of the assured, it would have been an easy matter to say so. *Susquehanna Ins. Co.* v. *Perrine*, 7 Watts & S. 348, is a case of that kind. There a person preparing the application was styled as surveyor, and it was provided that such applications might be made either by the applicant "or by the surveyor," and in all cases the assured will be bound by the application, for the purpose of taking which "such surveyor will be deemed the agent of the applicant."

Assuming the truth of the matters alleged in the offer, this case bears a close analogy to *Eilenberger* v. *Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; for the policy in that case contained a provision similar to that in the policy in suit,—a provision, however, which contained no restrictive words whatever; and it was held that they did not apply to an agent of the company who solicited insurance, made out applications, sent them to the home office, delivered the policies, and remitted the premiums. Whilst we have no particular evidence as to the authority of Strominger, these are the acts which he performed, and they were approved by the company. The other cases cited by the company on this branch are fully discussed and distinguished in the Eilenberger case, and further reference to them seems unnecessary now. "An examination of the facts in those cases," says Mr. Justice Trunkey, "will aid in understanding the scope of the opinions. In each there was

no question but that the warranty was made, and it was conceded that if there were a mutual mistake between the contracting parties, parol evidence was admissible to reform the policy. None declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract. The authorities go far, very likely not too far, in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact, and hold the principal to the contract, as if he had committed the wrong."

A copy of the application accompanied the policy, and it is argued that Kister could and ought to have read it, and if he had done so he would have seen the answers were untrue. These were considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud upon the part of the company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so: *Howard Ins. Co.* v. *Bruner*, 23 Pa. St. 50; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222. One thing is certain, however: the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination.

We are of the opinion, also, that if the amount of the encumbrances was not increased during the continuance of the policy, and before the date of fire, there was no breach of the condition against encumbrances, within the spirit and meaning of the policy. It may be conceded that in case of a warranty it is a matter of no consequence whether or not the act stipulated for be material to the risk. One of the objects of the warranty, it is said, is to preclude the controversy as to the materiality of the thing in question. Yet it must still be ascertained, under the ordinary rules of construction, what the thing is that is warranted, and this being ascertained, the insured is held to a full and literal performance of it: *Home Mut. Life Ass'n* v. *Gillespie*, 110 Pa. St. 88. But this covenant or

condition against future encumbrances does not stand upon the footing of a warranty. The warranty covers the representations contained in the application, whilst the condition referred to is a provision of the policy only, and is not within the terms of the warranty. The encumbering of the premises to be insured was intended to operate as a forfeiture. Now, if it be assumed that the plaintiff's proof would come up to the offer, which we say should have been received, it would appear that the plaintiff, at the time of the application, disclosed the fact that there were liens to the amount of four thousand dollars against the premises insured; that some of these were paid, but that he did not know how much; that at the time the application was made the amount of these encumbrances was less than three thousand dollars; that at no time did they exceed that amount, nor equal the amount represented. This provision of the policy is based upon the increased risk resulting from encumbrances; a person is supposed to have less interest in the preservation of his property when it is encumbered beyond its value. If the testimony contained in the offer is true, the company was willing to assume the obligation with the encumbrances then existing, and if these encumbrances were not increased in amount during the continuance of the policy, then the company was merely held to the risk which it at first assumed, and no more. The applicant, in stating the amount of encumbrances on his property, may include not only those actually entered, but such as are liable to be entered; for if he has given a judgment note or bond, he knows that it may, and probably will be, placed upon record. He may not have knowledge of the amount actually entered, but be able to state the amount in condition to be entered, and may represent the amount of liens accordingly. If the lien of one of the judgments entered should expire, it would certainly not be treated as a breach of the condition to have it revived; or if the assured, in order to raise money to pay a lien pressing for payment, should enter another in its place of equal amount, that would not affect the risk upon the premises insured; yet, in either case, the assured may be said to "have the same encumbered." The question we have been considering was referred to, but not decided, in *Pennsylvania Mut. Fire Ins. Co.* v. *Schmidt*, 119 Pa. St. 449.

Indemnity is the real object and purpose of all insurance, and this is to be kept constantly in view, and favored in the construction of policies of insurance. Such contracts are to

be construed liberally, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give: *Teutonia Ins. Co.* v. *Mund*, 102 Pa. St. 95. "Forfeitures are odious in law, and are enforced only where there is clear evidence that that was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture": *Helme* v. *Philadelphia Life Ins. Co.*, 61 Id. 107; 100 Am. Dec. 621.

The judgment is reversed, and a *venire facias de novo* awarded.

INSURANCE. — Ordinarily the misrepresentations of an agent are binding upon the insurance company: *Baker* v. *Ohio F. Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and note; for an insurance company is bound by the acts of its agents: *Menk* v. *Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158, and note 162, 163.

GENERAL AGENTS OF INSURANCE COMPANIES, who are: *Continental Ins. Co.* v. *Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121.

PENNSYLVANIA RAILROAD COMPANY *v.* LYONS.

[129 PENNSYLVANIA STATE, 113.]

COMMON CARRIERS — DUTY TO PASSENGERS AT THEIR DESTINATION. — A railroad company should stop its train and give a passenger a reasonable time to leave the train in safety at the place of his destination, and it is the duty of the passenger to exercise reasonable diligence and care.

COMMON CARRIERS — NEGLIGENCE IN JUMPING FROM MOVING TRAIN, WHEN QUESTION FOR JURY. — In an action to recover for personal injuries received in jumping from a moving train, where negligence is charged on both sides, and the evidence is conflicting as to whether or not the train was stopped a reasonable time to allow the passenger to alight in safety, the whole question should be left to the jury for its determination.

COMMON CARRIERS — WHEN NEGLIGENCE OF PASSENGER IN ALIGHTING FROM MOVING TRAIN IS FOR JURY. — When a passenger is placed in peril by the default or negligence of a railroad company, or when he leaves the train while it is in motion by direction of the company's agents, it is for the jury to determine, upon the evidence, whether the act was negligent or not. In such cases, all the circumstances, including the speed of the train at the time of leaving it, must be considered.

COMMON CARRIERS. — WHEN PASSENGER IN ALIGHTING FROM A RAILWAY TRAIN is injured, and alleges that it was caused by the neglect of the company to stop its train long enough to enable him to alight in safety, he must prove such neglect to the satisfaction of the jury, or fail in his action. When, therefore, it is found that sufficient time was given him to alight in safety, that he did not do so, but remained on the train until it was in motion, and then jumped, and was injured, he is guilty of contributory negligence, and cannot recover.

EVIDENCE — RES GESTÆ. — DECLARATION MADE BY AN INJURED PASSENGER immediately after the train passed, from which he jumped, and while he lay on the platform where he fell, is admissible as part of the *res gestæ*.

George Tucker Bispham and John Hampton Barnes, for the plaintiff in error.

W. Henry Sutton, for the defendant in error.

MCCOLLUM, J. The plaintiff below was a passenger on a train of the Pennsylvania Railroad Company, from Philadelphia to Haverford College station, on the evening of April 6, 1886. In alighting from the car at the latter place, he fell upon the platform of the station, and was injured. Alleging that the injury he received was caused by the unassisted negligence of the company, he brought this action to recover compensation for it. His claim is, that the train did not stop long enough to allow him to get off the car safely.

It was the duty of the company to give him a reasonable time to leave the train at the place of his destination, and it was his duty to use reasonable diligence and care in getting off there. It clearly appears that the train was moving when he left it, but whether he fell or voluntarily jumped from it is not clear, because the evidence on this point is conflicting.

As the alleged failure of the company to stop its train long enough to enable the plaintiff to leave it in safety constitutes the negligence complained of, it follows that if the company was not in default in this particular, it is not liable to the plaintiff for the injury he received. The testimony on the part of the plaintiff is, that the train stopped from ten to twenty seconds; on the part of the defendant, that it stopped a minute, and that from ten to fifteen passengers, mostly ladies, got off the train, and one or two passengers got on it, while it was at rest. It is contended that upon this evidence the court should have directed a verdict for the defendant, upon the ground that no negligence was shown, and the court's refusal to do so constitutes the fifth specification of error. We have no hesitation in deciding that this refusal was right, and that it was for the jury to determine, upon the whole evidence, whether the train stopped a reasonable and proper time to allow its passengers to alight safely. What is a reasonable time depends on the circumstances of the case as developed by the proofs.

It is further contended that if the defendant company failed to afford the plaintiff a reasonable time to leave the car safely,

he was guilty of contributory negligence in getting off while it was moving.

It is admitted that the plaintiff got off the car while it was running upon the track, and the general rule that it is negligence in a passenger to jump from a moving train is not seriously questioned. But to this general rule there are exceptions. When the passenger is placed in peril by the default or negligence of the company, or when he leaves the train while it is in motion, by direction of the company's agents, it is for the jury to say, upon the evidence, whether the act was negligent or not. In such cases all the circumstances, including the speed of the train at the time of leaving it, must be considered: *Pennsylvania R'y Co.* v. *Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787; *Pennsylvania R'y Co.* v. *Peters*, 116 Pa. St. 206; *Canal Co.* v. *Webster*, 18 Week. Not. 339; *Johnson* v. *West Chester etc. R. R. Co.*, 70 Pa. St. 357. In view of the evidence in the case and the principles already stated, the denial of the defendant's first, third, and fifth points was proper, and the specifications founded on such denial are dismissed.

The answer to the defendant's second point was erroneous and misleading. It did not, in terms, affirm or refuse the point, but it substantially denied any effect to a finding by the jury that the train stopped a sufficient time for the plaintiff to leave it, and that he jumped from it after it had started upon its course; and it declared that in all cases it was for the jury to determine whether it was negligence in a passenger to jump from a moving train, and that this depended altogether upon the speed of the train when he jumped from it. We cannot accept this as a correct statement of the law on the subject to which it relates. If a passenger, in alighting from a railway car, receives an injury, which he alleges was caused by the neglect of the company to stop its train long enough to enable him to leave it safely, he must prove such neglect to the satisfaction of the jury, or fail in his action. When, therefore, it is found that sufficient time was given him to get off in safety, that he did not do so, but remained on the train until it had started upon its course, and then jumped from it, and was injured, a clear case of injury arising from his own negligence is presented, and he cannot recover. In the present case, as we have seen, it was for the jury to determine whether a sufficient time was allowed the plaintiff to alight from the car before it started on its course, and this involved a consideration of all the circumstances of the case; but if it was ascertained

that sufficient time had been given for that purpose, that he did not use it, but remained upon the car until it was in motion, and then jumped from it, and was injured, the jury should have been instructed that his own negligence caused the injury, and prevented a recovery. This was the instruction the defendant's second point sought, but failed to obtain. A sufficient time in such cases means time to alight safely in the use of reasonable diligence and care, and has regard to all the circumstances which affect the act of getting off a train. The third specification of error is sustained.

We cannot say that it was error to receive the declaration made by the plaintiff immediately after the train passed, and while he lay on the platform where he fell. It was, under the authorities, a part of the *res gestæ: Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275; *Elkins* v. *McKean*, 79 Pa. St. 493. It differs from the declaration which was rejected in *Ogden* v. *Pennsylvania R. R. Co.*, 44 Leg. Int. 133, as that was made after the removal of the injured party from the place where he was found; in this case, it was made while the party was lying where he fell, and an instant after his fall. The first specification of error is not sustained.

Judgment reversed, and *venire facias de novo* awarded.

CARRIERS OF PASSENGERS — DUTY TO PASSENGERS AT DESTINATION. — A carrier of passengers is bound to use the same degree of care towards a passenger in his egress from the vehicle of carriage as when he remains thereon, provided such egress is for a proper purpose: *Dodge* v. *Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541. The carrier must announce the name of the station upon coming to it, and allow the passengers a reasonable opportunity to alight in safety: *Dorrah* v. *Illinois C. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and note 631.

CARRIERS OF PASSENGERS — DUTY OF PASSENGER AT DESTINATION. — A passenger must avail himself of the opportunity given him to alight at his point of destination in such a manner as not to be guilty of negligence on his part; so where a passenger, after the train had reached his station, and stopped the usual time for passengers to alight, being warned by the brakeman not to alight after the train had again started, nevertheless made an attempt to get off, and was injured, he was guilty of contributory negligence, and could not recover for his injuries: *New York etc. R. R. Co.* v. *Enches*, 127 Pa. St. 316; 14 Am. St. Rep. 848; *Illinois etc. R. R. Co.* v. *Slatton*, 54 Ill. 133; 5 Am. Rep. 109.

CONTRIBUTORY NEGLIGENCE OF A PASSENGER ALIGHTING FROM A TRAIN in motion is ordinarily a question of fact for the jury: *Raben* v. *Central R. R. Co.*, 74 Iowa, 732.

RES GESTÆ. — DECLARATIONS MADE BY A PLAINTIFF half an hour after an accident as to the manner of his leaving the train and receiving the injury are inadmissible in evidence as part of the *res gestæ*: *Savannah etc. R'y Co.* v. *Holland*, 82 Ga. 257; 14 Am. St. Rep. 158.

De Turk *v.* Commonwealth.

[129 Pennsylvania State, 151.]

Office and Officers — Incompatible Offices. — Office of county commissioner and that of postmaster are incompatible, independent of any statute to that effect, under constitutional provision that any person holding an office of trust or profit under the United States cannot at the same time hold an office in the state to which a salary is attached.

Office and Officers — Incompatible Offices. — Where a person is appointed to a state office who is already holding a federal office, and these offices are made incompatible by the state constitution, his acceptance and entering upon the duties of the state office does not create a vacancy in the federal office; but his right to hold the former may be questioned if he attempts to hold them both.

Office and Officers — Incompatible Offices. — Where a person is holding a federal and a state office, made incompatible by state constitution, but before answer and issue joined in *quo warranto* to oust him from the state office he formally resigns and surrenders the federal office, his title to the state office is thereby perfected so that he cannot be ousted therefrom by judgment in the *quo warranto* proceeding.

John W. Ryon, A. W. Schalck, and S. H. Kaercher, for the plaintiff in error.

William Wilhelm, John H. Nash, and W. J. Whitehouse, for the commonwealth.

McCollum, J. Section 2 of artice 12 of the constitution of Pennsylvania provides that "no member of Congress from this state, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall, at the same time. hold or exercise any office in this state to which a salary, fees, or perquisites shall be attached. The general assembly may, by law, declare what offices are incompatible."

Samuel G. De Turk was, on November 8, 1887, duly elected a commissioner of Schuylkill County, and on the first Monday of the following January executed the required bond, took the oath, and entered upon the duties of that office. At the time of his election he was holding, by appointment, the office of postmaster at De Turkville, in said county, and he continued to discharge its duties until November 13, 1888, when he resigned, and his successor was appointed. On October 24, 1888, upon the suggestion of the district attorney of said county that De Turk was then holding the office of county commissioner, an office in this state to which a salary is attached, and the office of postmaster, an office of trust and profit under the

United States, a writ of *quo warranto* was ordered, requiring the said Samuel G. De Turk to appear and show by what authority he claimed to exercise the office of county commissioner in the said county of Schuylkill. An answer was filed December 3, 1888, admitting the foregoing facts, but denying that the offices were incompatible, within the intent and meaning of the constitution, and the act of May 15, 1874: Pamph. Laws, 186. To this answer a demurrer was filed on January 10, 1889, and upon the issue thus joined the cause was heard, and on January 14, 1889, a judgment of ouster was entered against the defendant.

The contention of the plaintiff in error embraces three propositions: 1. These offices are not incompatible, because the legislature has not yet declared them to be so; 2. If they are incompatible, an acceptance of the second office is an implied resignation and vacation of the first; 3. An express resignation of the first office, before answer and hearing, is a sufficient compliance with the constitutional provision.

The constitution plainly prohibits any person holding an office of trust or profit under the United States from holding, at the same time, an office in this state to which a salary is attached; and it as plainly provides that the legislature may, by law, declare what offices are incompatible. The prohibition and the permission or direction are contained in the same section, but in separate sentences of it. Is the former inoperative by reason of the latter? Does the section, as a whole, mean that no person can hold these offices, at the same time, if the legislature shall declare them incompatible? We cannot so construe it. The prohibition may be enforced without legislative aid, and no action or inaction of the legislature can destroy it. This construction does not render the last sentence of the section useless, because that relates to offices not within the constitutional prohibition, and authorizes the legislature to declare them incompatible: *Commonwealth* v. *Ford*, 5 Pa. St. 67.

We next inquire whether De Turk forfeited and created a vacancy in the office of postmaster by accepting and entering upon the duties of the office of county commissioner. In considering this question, regard must be had to the fact that the former is an office under the government of the United States, and the latter an office under the state government. If the titles to these offices were derived from a common source, it might well be held that an acceptance of the second office was

an implied resignation and vacation of the first. This is the common-law rule, and the current of authority in this country sustains it. But the state cannot declare the federal office vacant, nor remove the incumbent from it. It may, however, enforce the constitutional provision by proceedings to test his title to the office he holds under its laws, and it may remove him from that office, if he does not surrender the office he holds under the government of the United States. It follows from these views that at the time of the institution of this suit De Turk had not an indefeasible title to the office of county commissioner, because he was then in actual possession, and exercising the functions, of an office of trust and profit under the United States.

Did his formal resignation and complete surrender of it, before answer, place him in accord with the constitution, and perfect his title to the office of county commissioner? By accepting it, and entering upon its duties, he elected to hold it. This election was confirmed by his express resignation of the office of postmaster, and the appointment of his successor, before issue was joined. When he appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. The judgment of ouster, therefore, rests on an alleged forfeiture resulting from a prior holding of the two offices at the same time. But as the acceptance of the second office was an implied resignation of the first, — an election to hold the former and to surrender the latter, — it did not forfeit respondent's title to the office which he so elected to hold and exercise. This case depends entirely upon the construction of the constitutional provision against the holding of incompatible offices, as it is not covered by any statute. The constitution makes these offices incompatible; but it does not prescribe a penalty or declare a forfeiture. We are of opinion that when issue was joined in this case the respondent had a valid title to the office of county commissioner, and that it was error to enter judgment of ouster. *Commonwealth* v. *Pyle*, 18 Pa. St. 519, is not in conflict with this conclusion. It merely decided that a stockholder in a bank could not hold the office of notary public, because by the act of April 14, 1840, the legislature had so declared. What was there said with reference to incompatible offices was not necessary to the determination of the question before the court.

Judgment reversed.

OFFICE AND OFFICERS — INCOMPATIBLE OFFICES. — It has been held that the following offices are incompatible, and cannot be held by one person at the same time: District judge and deputy sheriff: *State* v. *Goff*, 15 R. I. 505; 2 Am. St. Rep. 921; any salaried federal office and any state office: *People* v. *Leonard*, 73 Cal. 230; postmaster and judge of the county court: *Hoglan* v. *Carpenter*, 4 Bush, 89; postmaster and township trustee: *Foltz* v. *Kerlin*, 105 Ind. 221; 55 Am. Rep. 197; *State* v. *Kirk*, 44 Ind. 401; 15 Am. Rep. 239; alderman and member of Congress: *People* v. *Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; commissioner of the United States centennial commission and presidential elector: *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538; a lucrative federal office of any kind and sheriff: *Bunting* v. *Willis*, 27 Gratt. 144; 21 Am. Rep. 338; trial justice and deputy sheriff: *Stubbs* v. *Lee*, 64 Me. 195; 18 Am. Rep. 251; justice of the peace and constable: *Magie* v. *Stoddard*, 25 Conn. 565; 68 Am. Dec. 375; justice of the peace and deputy sheriff: *Wilson* v. *King*, 3 Litt. 457; 14 Am. Dec. 84.

ONE WHO ACCEPTS AN OFFICE INCOMPATIBLE WITH AN OFFICE already held by him *ipso facto* vacates the first office: *State* v. *Goff*, 15 R. I. 505; 2 Am. St. Rep. 921, and particularly note. But where two offices are not incompatible, as district clerk and court commissioner, acceptance of one by the incumbent of the other will not operate as a vacation of the latter: *Kenney* v. *Goergen*, 36 Minn. 190.

PALMER *v.* FARRELL.

[129 PENNSYLVANIA STATE, 162.]

DEEDS — CONSTRUCTION — EVIDENCE TO VARY. — When the bank of a navigable stream is called for as a boundary in a deed, the law will presume the grantor's intention to have been to carry the line to low-water mark; and when the words of the deed are clear and consistent, and no fraud or mistake is alleged, the intention of the parties cannot be shown to override their obvious meaning. If, however, there is anything in the deed which indicates a different intent, the question is one of construction for the court; or if there are extraneous facts or circumstances which, if proved, would bear upon the proper construction, that question may, under proper instructions, become one for the jury.

DEEDS — CONSTRUCTION — PAROL EVIDENCE TO VARY. — Where a deed calls for land "bounded and described according to" a certain survey, and does not call for a river as a boundary, but does call for certain lines run between certain points designated by the surveyor as on the bank of a river, and which exclude the land in dispute, parol evidence is admissible to show that the river bank referred to is artificial; that the grantee had notice before the sale that the grantor reserved the land in dispute, and refused to execute a deed expressly conveying it; that the sale was expressly subject to a survey which was afterwards made; and that the lines in the deed were in exact accordance with such survey.

WITNESS — COMPETENCY — EVIDENCE TO EXPLAIN DEED. — In a controversy as to whether or not certain lands were conveyed by deed, where the plaintiff claims under the grantors and the defendant under the grantee in such deed, one of the grantors who has conveyed her interest without covenant of title is competent to testify as to such matters as

are admissible to explain the deed, although the other grantors are dead, and when she is not called against their interests, and such grantee is alive, and competent to testify as to the same matters.

Dwight M. Lowrey and A. U. Bannard, for the plaintiffs in error.

Charles H. Downing, for the defendants in error.

CLARK, J. This is an action of ejectment brought to recover about twenty-six acres of land, situate on the west side of the Schuylkill, opposite Point Breeze, in the twenty-seventh ward of the city of Philadelphia. The description contained in the writ is not printed, but according to the plaintiffs' paper-book, the disputed property is "flat land," bounded on the north by a line run upon the dike or artificial bank of the Schuylkill River, on the south by low-water mark, and on the east and west by the projection to low-water mark of the side lines of a ten-acre meadow, or fast lands, of defendants, in front of which are the flats. These flats, being between high and low water mark, are covered with water, except when the tides are low, and are valuable only as accretions may make them so for the purpose of a wharf. As the court below entered a nonsuit, we are bound to accept the testimony which was taken as true, treat the offers of evidence which were refused as if they were justified by the proof, and give to the plaintiffs the benefit of all the inferences which may fairly arise out of the facts thus assumed.

The common source of title was Aaron Palmer, to whom, on September 17, 1791, one Nathan Jones, by a deed, conveyed the meadow-grounds to which the flats were appurtenant. Aaron Palmer died November 11, 1817, and was seised of the property at the time of his death; for it was admitted at the trial that Aaron Palmer, or his heirs, claiming under him, was in the actual possession from the date of this deed until May 13, 1864, the date of the defendants' deed from Lydia P. Palmer.

It is conceded that by this means Aaron Palmer was invested with title, not only to the fast land, but also to the flat lands, upon the principle that a grant of land bounded upon a navigable river extends to low-water mark, subject, however, to the right of the public for the purpose of navigation: *Carson* v. *Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Ball* v. *Slack*, 2 Whart. 508; 30 Am. Dec. 278; *Coovert* v. *O'Conner*, 8 Watts, 470; *Jones* v. *Janney*, 8 Watts & S. 439; 42 Am. Dec. 309;

Fulmer v. *Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88. The authorities upon this subject are collected in *Wood* v. *Appal*, 63 Pa. St. 210, and the law may be regarded as settled beyond question. "Between high and low water mark upon a navigable river, the grantee takes subject to the rights of the public; and as between him and the public, he may use his land below high-water mark for such purposes as do not interfere with the free flow and navigation of the waters": *Fulmer* v. *Williams*, *supra*. The possession of the fast land is therefore possession of the flats. That boats or vessels at high water pass over the flats amounts to nothing, as respects the possession; for the possession is necessarily subject to the use of the water by the public: *Ball* v. *Slack*, *supra*.

The plaintiffs' claim is through a series of assignments from those entitled by devolution under the last will and testament of Aaron Palmer, deceased. The defendants claim under the deed of May 13, 1864, from persons entitled in the same right; and the whole question turns upon the proper force and effect of that deed. Did the conveyance from Lydia P. Palmer *et al.* to Hamilton Farrell for the fast lands pass the title to the flats also? The general rule undoubtedly is as we have stated it; but there are cases in which the intention of the parties may be otherwise, and it is a cardinal rule in all cases that a grant is to be construed according to that intention. "The character of this kind of property is such that land bordering on the flats, and the flats, naturally go together. Their most beneficial enjoyment is derived from their connection; and it is inconceivable that any man in his sober senses having, or supposing he had, a title to both would intentionally separate them, and convey the meadow to one of his children, and the flats in front of it to another. For this reason it is that an express exception is required in the grant, or some unequivocal declaration, or certain immemorial usage, to limit the title of the owner in such cases to the edge of the river": *Jones* v. *Janney*, *supra*. It is therefore this peculiar connection in their uses which gives rise to the presumption that the grant is intended to pass the flats with the fast land; but this presumption of fact may, like any other, be rebutted by proper and competent evidence of a contrary intention. "Of course," says Mr. Justice Agnew in *Wood* v. *Appal*, *supra*, "the rule as now laid down applies only to a case where no other intention is disclosed by the return of the survey or the deed." The very recent case of *Risdon* v. *Philadelphia*, 18 Week. Not. 73,

illustrates the rule applicable in such a case with much clearness. In that case, Carson held title through a patent from the Duke of York, granted in 1667 to Andrew Carr for "land lying and being in Delaware River, nearly into Lawsa Cocks, containing, by estimation, one hundred acres or thereabouts, be it more or less, bounded on the south with the said river, on the north with the woods, and on the northeast with Pennebeckahs creek or kills." Notwithstanding this patent plainly included the flats, Carr, in 1838, procured from the surveyor-general a separate patent for the flats, and in a future conveyance of the fast lands followed apparently as a dividing line the courses and distances of the patent of 1838, and on one of these lines called for the flats. "These and other matters of description in the deed," says our Brother Sterrett, who delivered the opinion of the court, "taken in connection with the fact that Carson evidently claimed to hold the flat land by virtue of his patent from the commonwealth, would seem to indicate that it was the intention to exclude, rather than include, these lands in the conveyance to Ryan. At all events, it was not a question which the court, under the evidence, could decide as matter of law. It is unnecessary to say that Carson did or did not acquire anything by his patent of 1838. He evidently treated it as valid, and this fact, in connection with others, should not be ignored in determining whether the flats and margins in front of the fast lands were included in the conveyance to Ryan."

It is apparent, therefore, that the question in each case is determinable upon the true and proper construction of the grant. When the bank of a navigable stream is called for as a boundary,—that and no more,—the law will presume the grantor's intention to have been to carry the line to low-water mark; and when the words of a grant are clear and consistent, when they contain no ambiguity, and no fraud or mistake is alleged, the intention of the parties cannot be shown to override their obvious meaning; but if there is anything in the words of the grant which would indicate a probably different intent, the question, in the absence of mistake or fraud, is one for construction of the court; or if there be extraneous facts or surrounding circumstances alleged which would, if established, bear upon the proper construction, the question may, under proper instructions, become one for the jury. Is there anything upon the face of the deed dated May 13, 1864, from Lydia P. Palmer *et al.* to Hamilton Farrell, which calls for con-

struction? It is clear that the flats are not embraced within the words of the description as written in this deed. The lands are "bounded and described according to the survey made thereof by James Miller on the twenty-sixth day of April, A. D. 1864,"—only a few days before the execution of this deed. The lines of that survey are the lines given in the deed, and admittedly exclude the lands in dispute. It is plain, then, that it is only by a legal construction of the deed, based upon an assumed intention of the grantors, that the flat lands can be embraced in it; and as the court is thus called upon to construe the deed, that work must be conducted according to established rules. The words of the grant are wholly consistent with the contention of the plaintiffs in error, that the flat lands were not embraced, and it is only by a legal construction that they may be otherwise understood. The description does not call for the river; it calls for a line run between certain points, designated by the surveyor as on the bank of the river. Under these circumstances, whatever the presumption might be, we think it was competent for the plaintiffs to prove, not their own declarations, perhaps, or even the parol admissions of Farrell, but the extrinsic facts and circumstances attending the transaction, viz., that this bank was an artificial one, in the nature of a dike, which was erected to rescue the meadow from inundation; that Farrell had notice before the sale that the plaintiffs reserved the flats; that the plaintiffs refused to execute a deed which by its express terms conveyed the flats; that the sale was expressly subject to a survey which was afterwards made; and that the lines in the deed were in exact accordance with that survey, the lines having been drawn upon the bank in order to meet the objections then stated. These facts, taken with the particular description of the deed, would seem to indicate that it was the intention to exclude, rather than include, the flat lands in the making of the deed to Farrell. The force of these facts, if shown, would of course be for the jury; but the evidence, we think, should have been received and submitted to their consideration.

Nor can we discover any good reason for excluding Lydia P. Palmer as a witness for the purpose stated. As the heir at law of Hannah Jones, she was originally entitled to the undivided one half of the property in dispute. She, with her husband, joined in the deed to Farrell, and as the deed and the title to the lands in dispute, as affected thereby, constitute

the thing or contract in action, she may well be said to have been a party thereto. The true force and effect of this deed is "the subject in controversy," and to that deed she was a party. It is equally true that the other grantors in the deed are dead, and their right thereto or therein has passed by their own act, or the act of the law, to the party on record who represents their interest. The witness was wholly without interest. She had, by a deed of conveyance, disposed of her entire right, and entered into no covenants against any outstanding title. She might ultimately, perhaps, be liable for part of the costs, but this, by section 4 of the act of 1887, was not ground for her incompetency. This, in view of the recognized policy of the statute to exclude the surviving party to the transaction, whether interested or not, is perhaps unimportant; but there are other considerations upon which the competency of the witness is to be determined. She was called, not against the interest of the parties deceased, but in support of that interest; and Farrell, the adverse party, was alive, and competent to testify upon the same matters. If the witness is within the provision of clause *e* at all, she comes clearly within the exception to that clause, "unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees, and the other party on the record, or between such surviving or remaining partners, promisors, or promisees, and the person having an interest adverse to them; in which case any person may testify to such matters." The action is brought by two living parties, one of them representing the interest of Lydia P. Palmer, the surviving or remaining party to the deed, and the other representing the interest of Mary Palmer, who is dead. The assignees of Mary's interest cannot complain of inequality, as the witness was called in their behalf; and Farrell cannot complain, as he was also competent as to all "such matters" as the witness might embrace in her testimony.

The judgment is reversed, and a *venire facias de novo* is awarded.

WHO MUST CONSTRUE WRITTEN INSTRUMENTS: See note to *Fagin* v. *Connoly*, 69 Am. Dec. 454–460. Where the terms are explicit, the court must determine the legal effect of a deed; yet the jury are to determine what a contract in writing is, when the meaning is doubtful: *Harris* v. *Mott*, 97 N. C. 103; but even when contracts are submitted to the jury, the court

must instruct as to their legal effect: *Church* v. *Melville*, 17 Or. 413; even if the contract is oral: *Stewart* v. *Fowler*, 37 Kan. 677.

PAROL EVIDENCE WITH RESPECT TO WRITINGS, GENERALLY: See note to *Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 893, 894. The general rule is, that contracts are to be construed and interpreted in the light of the conditions and circumstances under which they are made: *Tufts* v. *Greenewald*, 66 Miss. 360; *Wilczinski* v. *Louisville etc. R'y Co.*, 66 Id. 596; *Jones* v. *Hughes*, 66 Id. 413. But when parties reduce their contract to writing, all oral negotiations preceding and accompanying the execution of the written contract are deemed merged into it; the writing is exclusive evidence of the agreement between the parties, and parol testimony cannot, as a rule, be admitted to contradict, add to, or vary it: *Gorusch* v. *Rutledge*, 70 Md. 272; *Aultman* v. *Brown*, 39 Minn. 323; *McCormick etc. Co.* v. *Wilson*, 39 Id. 467; *Avery* v. *Miller*, 86 Ala. 495; *Meekins* v. *Newberry*, 101 N. C. 17; *Delaney* v. *Linder*, 22 Neb. 274; *Gomilla* v. *Hibernia Ins. Co.*, 40 La. Ann. 553; *Cumming* v. *Barber*, 99 N. C. 332; *Express Pub. Co.* v. *Aldine Press*, 126 Pa. St. 347; *Hostetter* v. *Auman*, 119 Ind. 7; *Milliken* v. *Callahan*, 69 Tex. 205; *Freeman* v. *Freeman*, 68 Mich. 28; *National Mut. Ben. Co.* v. *Heckman*, 86 Ky. 254; *Miller* v. *Butterfield*, 79 Cal. 62; *Pickett* v. *Green*, 120 Ind. 584; *Knowlton* v. *Keenan*, 146 Mass. 86; *Sterrett* v. *Miles*, 87 Ala. 472; *Bailey* v. *Briant*, 117 Ind. 362; *George* v. *Conhaim*, 38 Minn. 338; *Barrard* v. *Roane I. Co.*, 85 Tenn. 139; *Philips* v. *Bigelow Windmill Co.*, 41 Kan. 763. But a prior warranty as to the quality of land conveyed by a warranty deed is not merged in the deed, and may be established by oral evidence: *Saville* v. *Chalmers*, 76 Iowa, 325. Written instruments can always be properly attacked by parol testimony for fraud or mistake: *Cumming* v. *Barber*, 99 N. C. 332; *Meekins* v. *Newberry*, 101 Id. 17; *Ganser* v. *Fireman's F. Ins. Co.*, 38 Minn. 74; *Louisville etc. R. R. Co.* v. *Power*, 119 Ind. 269; *Buck* v. *Holt*, 74 Iowa, 294; *Barrard* v. *Roane I. Co.*, 85 Tenn. 139. Parol testimony is admissible to apply written contracts to their proper subject-matter: *Moses* v. *Hatfield*, 27 S. C. 324; *Price* v. *Ferguson*, 66 Miss. 404; *George* v. *Conhaim*, 38 Minn. 338; *Tufts* v. *Greenewald*, 66 Miss. 360; but this necessitates proof of the most satisfactory kind: *Hunt* v. *Gray*, 76 Iowa, 268. So parol testimony may explain descriptions in written instruments, or identify the property therein mentioned: *Irrigation District* v. *De Lappe*, 79 Cal. 351; *Caspar* v. *Jamison*, 120 Ind. 59; *Black* v. *Pratt*, 85 Ala. 504; *Foss* v. *Hinckell*, 78 Cal. 158; *Van Horne* v. *Clark*, 126 Pa. St. 411; *Murray* v. *Hobson*, 10 Col. 66; *Angel* v. *Simpson*, 85 Ala. 53; *Rhodes* v. *Wilson*, 12 Col. 65; *Shuler* v. *Dutton*, 75 Iowa, 155; *O'Neal* v. *Seixas*, 85 Ala. 80; *Clapp* v. *Trowbridge*, 74 Iowa, 550; *Plano Mfg. Co.* v. *Griffith*, 75 Id. 102; *Reber* v. *Dowling*, 65 Miss. 259; *Grubb* v. *Foust*, 99 N. C. 286; *In re Casement*, 78 Cal. 136; or explain and supply omissions: *Pickett* v. *Ferguson*, 86 Tenn. 642. The real consideration of a contract in writing may be shown by oral evidence, when it becomes material to do so: *Flynn* v. *Flynn*, 68 Mich. 20; *Collar* v. *Collar*, 75 Id. 414; *Bruce* v. *Slemp*, 82 Va. 352; *Indiana etc. R'y Co.* v. *Finnell*, 116 Ind. 414; *Nazro* v. *Ware*, 38 Minn. 443; *Murdock* v. *Cox*, 118 Ind. 266; *Moses* v. *Hatfield*, 27 S. C. 324; *Calvert* v. *Nickels*, 26 Id. 304. But in *Scholz* v. *Dankert*, 69 Wis. 416, which was an action for rent upon a written lease, parol testimony could not show that at the time, as one of the considerations of the lease, the lessor promised to refrain from engaging in the butcher business in the same block. But in *Benton* v. *Monnier*, 77 Cal. 449, it was held that parol evidence was admissible to explain the circumstances under which an assignment of a contract was made, and its object. Latent ambiguities in written instruments may be

explained by oral evidence, when such ambiguities arise, not upon the face of the instrument itself, but from the facts therein referred to, which are extrinsic to the instrument: *Daugherty* v. *Rogers*, 119 Ind. 254; and in Georgia, even patent ambiguities can be explained: *Mohr* v. *Dillon*, 80 Ga. 572; *Hill* v. *King Mfg. Co.*, 79 Id. 106; although ordinarily patent ambiguities render a deed void: *Black* v. *Pratt*, 85 Ala. 504. Where only a portion of a contract has been reduced to writing, parol testimony is admissible always to prove the entire agreement entered into by the parties: *Cumming* v. *Barber*, 99 N. C. 332; *Blackerby* v. *Continental Ins. Co.*, 83 Ky. 574; *Jackson* v. *Mott*, 76 Iowa, 264. When a question arises collaterally as to an instrument of writing, a witness may testify concerning it, but its contents cannot be thus shown: *Wollner* v. *Lehman*, 85 Ala. 274; *Marriner* v. *Dennison*, 78 Cal. 203. Although parol agreements made contemporaneously with a written contract cannot, as a rule, be shown to vary the effect of such written contract (*Diven* v. *Johnson*, 117 Ind. 512; *Rodgers* v. *Perrault*, 41 Kan. 385), still in *Ayer* v. *Bell Mfg. Co.*, 147 Mass. 46, where a written order for goods, signed only by the purchaser, described the kind of goods bought and named the price paid therefor, parol testimony was held proper to prove a collateral oral agreement by the vendor to advertise the goods. Parol testimony is admissible to show the true date of a misdated instrument: *Biggs* v. *Piper*, 86 Tenn. 589; or that an instrument of writing was not delivered upon the day of its date: *Bruce* v. *Slemp*, 82 Va. 352; or to prove facts which are corroborative evidence of the execution and delivery of an instrument in writing: *Conlan* v. *Grace*, 36 Minn. 276; or to show facts which, if true, tend to show the incapacity of a grantor to make a valid conveyance: *Woodcock* v. *Johnson*, 36 Minn. 217. The contents of lost or destroyed instruments in writing can be proved by parol testimony, when their loss or destruction has been satisfactorily proved: *McClure* v. *Campbell*, 25 Neb. 57; *Behee* v. *Railway Co.*, 71 Tex. 424; *Alabama etc. R. R. Co.* v. *Mt. Vernon Co.*, 84 Ala. 173; *Ramsey* v. *Hurley*, 72 Tex. 194; *Krewson* v. *Purdom*, 15 Or. 589; *Ricketts* v. *Birmingham etc. Co.*, 85 Ala. 600; *Apperson* v. *Dowdy*, 82 Va. 776; *Jennings* v. *Reeves*, 101 N. C. 447; *Cilley* v. *Van Patten*, 68 Mich. 80. Parol testimony inadmissible to vary a written contract, but received in evidence for some other reason, should not be allowed to affect the written contract in any way: *Tyler* v. *Stone*, 81 Cal. 236; *Holloway* v. *McNear*, 81 Id. 154.

PAROL TESTIMONY WITH RESPECT TO DEEDS: See *Shore* v. *Miller*, 80 Ga. 93; 12 Am. St. Rep. 239; *Feeney* v. *Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Finlayson* v. *Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836, and particularly note 844, 845. Parol testimony can show a deed, absolute upon its face, to be only an equitable mortgage: *Seiler* v. *Northern Bank*, 86 Ky. 128; note to *Mannix* v. *Purcell*, *ante*, p. 583. But in *Grant* v. *Frost*, 80 Me. 202, it was held that parol testimony could not prove that a formal bill of sale, absolute in its terms, was intended for a pledge or mortgage.

HESSEL *v.* JOHNSON.

[129 PENNSYLVANIA STATE, 173.]

LANDLORD AND TENANT — RIGHTS OF SUBTENANT. — A tenant for a term certain, who has underlet a portion of the premises, has no right to surrender his lease to the prejudice of the under-tenant; and in such case the latter will be held to have attorned to the landlord under the conditions of his sublease.

LANDLORD AND TENANT — RIGHTS OF SUBTENANT. — Where a tenant for a term certain has underlet a portion of the premises and surrendered his lease, the subtenant remaining in possession, his goods cannot be distrained for rent owing by a subsequent tenant, to whom the landlord has leased the whole premises after the surrender.

LANDLORD AND TENANT. — AVOWRY FOR RENT IN ARREAR WILL NOT LIE until the tenant acquires possession, and the relation of landlord and tenant is shown to exist as to the premises upon which the seizure is made, if the goods distrained belong to a stranger.

REPLEVIN. Defendant filed an avowry and cognizance for rent in arrear. Judgment for defendant. Plaintiff brings error.

William C. Mayne, for the plaintiff in error.

Roland Evans and R. L. Ashhurst, for the defendant in error.

CLARK, J. At the trial of this case, the facts do not appear to have been in dispute. The effect of the avowry and cognizance was, as it were, to make the defendant in the suit the plaintiff at the trial, and to impose on him the burden of proof. When the defendant's case rested, the court, assuming, perhaps, from the statements of counsel, that the facts were admitted, gave the case to the jury, with peremptory instructions to find in his favor, which the jury did, finding also that the rent in arrear was $233.32, and the value of the goods replevied $300. Whether the plaintiff waived the privilege of producing any testimony in reply does not appear; but it is reasonable to suppose he did, as there seems to have been no objection taken at the time to the action of the court in this respect. Assuming this to be so, we will consider the case as if the facts exhibited in the defendant's proofs were not disputed, and determine whether or not the court was right in giving the binding instructions complained of.

It is a reasonable rule of the law, and well settled, we think, that a tenant for a certain term, or for life, who has underlet, has no right to surrender his lease to the prejudice of the subtenant: 1 Shep. Touch. 301; Taylor on Landlord and Tenant, sec. 111; *Adams* v. *Goddard*, 48 Me. 212; *Eten* v. *Luyster*, 60

N. Y. 252; *Brown* v. *Butler*, 4 Phila. 71. If, therefore, Rossiter, on the first day of January, 1886, took a lease of the entire premises at the corner of Race and Tenth streets for a term of fifteen months, at the rate of seven hundred dollars per year rent, payable as in the contract is provided, and at the expiration of the term elected to hold over according to the conditions of his contract, he became a tenant for that year on the same terms, and would have no right, during the year, to surrender the term to the prejudice of Hessel, who also held over upon the terms of his contract with Rossiter. Hessel was in lawful possession as a subtenant, under his contract, and the surrender of the original lease by Rossiter could not affect him. His right could not be disturbed by any act which it was not in his power to prevent: *Doe* v. *Pyke*, 5 Maule & S. 146; *Piggott* v. *Stratton*, 1 De G., F. & J. 33–46. The effect of a surrender is to terminate the relation of landlord and tenant; and it has been said that it will, in like manner, terminate with it all the parties to that relation. Prior to the statute of 4 George II., chapter 28, it had been held, in England, that although a tenant who has made an under-lease cannot, by a surrender, prejudice his tenant's interest, yet he would lose the right to distrain for rent reserved upon the under-lease; for, since the rent is incident to the reversion, the surrenderor cannot collect it in this form, because he has parted with his reversion to the original lessor; nor could the surrenderee have this remedy, because the reversion to which it was incident at the time of the surrender merged in the greater reversion, of which he was already possessed: *Thier* v. *Barton*, Moore, 94; *Webb* v. *Russell*, 3 Term Rep. 401; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400. By the statute referred to, however, it was provided that if a lease be surrendered, in order to be renewed, and a new lease given, the relation of landlord and tenant between the original lessee and his under-lessee should be preserved; and it placed the chief landlord and his lessee and the under-lessee, in reference to rents, rights, and remedies, exactly in the same situation as if no surrender had been made: See Taylor on Landlord and Tenant, sec. 518. Similar provisions have been adopted in New York by statute: 1 R. S. 744. In 4 Kent's Commentaries, 103, it is suggested that, in those states in which this provision has not been adopted, the question may arise, how far the under-tenant, whose derivative estate still continues, is, by the surrender of his lessor, discharged from the rents and covenants annexed to his tenancy.

But the doctrine of merger will not, we think, under our cases, ordinarily be held to apply, against the intention of the parties and against the interest of the original lessor: *Moore* v. *Harrisburg Bank*, 8 Watts, 138; *Duncan* v. *Drury*, 9 Pa. St. 332; 49 Am. Dec. 563. Assuming that the intention of the parties was not to create a merger, Rossiter's surrender may be regarded as in the nature of a transfer of the sublease to Johnson, who thereupon was entitled to exercise the rights of the mesne lessor against the subtenant. The effect of Rossiter's surrender, as upon a transfer or assignment, was therefore to attorn the subtenant to the original landlord, to whom he was bound to fulfill the conditions of his contract in the payment of the rent; and, failing to pay the rent, his goods upon the demised premises were liable to distress, according to the terms of the lease from Rossiter. But the acceptance of the surrender of Rossiter's lease dissolved the relations theretofore subsisting, not only between the original lessor and lessee, but between this lessee and the subtenant. If Rossiter was no longer Johnson's tenant, Hessel could not be his subtenant. As the matter thus stood, Johnson, as the agent of the owners of the fee, had resumed the possession and control, subject to the rights of Hessel, who will be held to have attorned to him.

Johnson then leased the entire premises, including the storeroom and the cellar, to Fritz, for a term of two years from the first day of November, 1887, at the rate of seven hundred dollars per year, rent payable as stated in the contract. This lease was also necessarily subject to the rights of Hessel, who was then, and afterwards remained, in the actual possession of a part of the premises; and Fritz must be taken to have accepted the lease with this encumbrance. Fritz, as between himself and Johnson, under his contract, had the right to insist upon the possession of the entire premises. He was not obliged to accept the possession of a part only; but, if he chose to enter into the possession of a part, he had the right to do so, and either to take, subject to Hessel's tenancy, to the end of Hessel's term, or to hold Johnson, his lessor, for the injury sustained in the detention of the possession. But in no event can Hessel be considered a subtenant. His goods were liable to be distrained upon for his own rent, either by Johnson or Fritz, as assignee of Johnson, as the case might be, but in no event were they liable to be seized for the rent owing by Fritz; for Fritz was not yet in possession of that portion of the prem-

ises under his lease, and Hessel did not hold, either mediately or immediately, under the lease upon which such a distress would be made. The relation of landlord and tenant cannot in any proper sense be considered complete until the tenant acquires the possession; and, to sustain an avowry for rent in arrear, that relation must be shown to exist, as to the very premises upon which the seizure is made, if the goods distrained are the goods of a stranger: *Helser* v. *Pott*, 3 Pa. St. 179. The case of *Whiting* v. *Lake*, 91 Id. 349, cited by the court, and greatly relied upon by the defendant in error, is not in point. In that case, Henkle and Brothers were lessees of Simpson. Going out of business, they quit the possession, and Whiting & Co. went in under them. Whiting & Co. held over after the termination of Henkle and Brothers' lease, and it was held that, under the provision of the act of March 21, 1772, 1 Sm. L. 370, the goods of Whiting & Co. were liable to distress for rent due by Henkle and Brothers before as well as after the termination of the lease, unless such possession was continued under the authority of the owner. The cases bear no analogy. Here there was no holding over after the lease was determined. The lease was surrendered by Rossiter, and the surrender was accepted, with knowledge of Hessel's right to hold to the end of his term.

If we are right in our views of this case, the defendant has not sustained his avowry and cognizance, and it is unnecessary to consider the other questions raised.

The judgment is reversed, and a *venire facias de novo* is awarded.

LANDLORD AND TENANT. — The grantee or sublessee of a tenant enters, in the contemplation of the law, as the tenant of the original lessor: *Jackson* v. *Davis*, 5 Cow. 123; 15 Am. Dec. 451, and note; *Jackson* v. *Miller*, 6 Wend. 228; 21 Am. Dec. 316; *Jackson* v. *Harsen*, 7 Cow. 323; 17 Am. Dec. 517; but in *Giddings* v. *Felker*, 70 Tex. 176, it was decided that a subtenant, in the absence of a stipulation to the contrary, was not liable to the landlord for rent, unless he became the assignee of the term. And in *Moore* v. *Faison*, 97 N. C. 322, where a lessee sublet part of a leased farm, it was held that the lessee became lessor to his sublessee, and was entitled to the same lien upon the crop which the statute gave the original lessor.

IN THE CASE of *Fisher* v. *Slattery*, 75 Cal. 325, a lease for one year, with option of renewal by the lessee, contained a clause against subletting without lessor's permission. During the year defendant entered the leased premises by consent of the lessee, remaining till the end of the year. Lessors refused to receive rent from defendant, or consider him as their tenant. At the expiration of the year the lessee surrendered his lease, and refused to exercise his option to renew it. It was held that there had been no sub-

letting with lessor's consent, nor a parol assignment of the lease; and that defendant, at the surrender of the lease, became a trespasser upon the premises.

GOODS OF STRANGER — DISTRESS FOR RENT. — The goods of a stranger in the possession of a tenant, not of necessity to the latter's trade, but as a matter of favor, and without hire, are not exempt from distress for the arrears of rent of the premises upon which they are found: *Page* v. *Middleton*, 118 Pa. St. 546.

ZIMMERMAN *v.* ZIMMERMAN.

[129 PENNSYLVANIA STATE, 229.]

PARENT AND CHILD — COMPENSATION FOR SERVICES RENDERED BY CHILD. — When a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged perent, he must prove an express and actual contract definite in its terms, and proof of loose declarations of gratitude and of an intention to compensate, made by an old man in the extremity of his last sickness, will not be sufficient to support the claim.

S. J. M. McCarrell and David Flemming, for the appellant.

Josiah Funck, for the appellee.

PAXSON, C. J. This belongs to a class of cases which unfortunately are becoming too frequent. It was an action brought below by the plaintiff against the executor of his father's estate, to recover compensation for the care and nursing of his aged father for the last two years of his life.

It appears that the plaintiff and his father lived upon the same farm, though occupying separate houses a few feet apart. The farm belonged to the father; the son worked it as tenant. For the last two years or so of his life, the old man became feeble, and required more or less attention; sometimes would fall down, and his son would have to be called in to help him; he had little control of his bowels or urine, and needed to be helped when he wanted to move about or change his position. The plaintiff was occasionally compelled to remain at his father's house all night, in order to take care of him. There is no doubt he performed many duties to his father, some of which were disagreeable. This, however, was a duty which he owed to his father, and was but a return for like duties rendered him in his infancy by his parents. The law regards such services as but the performance of a filial duty, which every man owes his parents, and implies no contract for compensation therefor. A recovery may, of course, be had upon an express contract, and this is what was attempted in this

case. The learned judge below was of opinion that no express contract had been proved, and gave the jury a binding instruction to find for the defendant. This is the matter of which the plaintiff complains.

The testimony did not prove a contract in the clear and unequivocal manner required between parent and child. It was vague and uncertain, and consisted of loose declarations of the testator. As a specimen, and it is perhaps the strongest one I can select, I will refer to the testimony of Frank Zimmerman, a son of the plaintiff: "Q. Now, what was said when your father was present? A. Grandfather asked him [plaintiff] for water; and he said, 'Come and get me water and you shall be paid for what you do, if it takes all I have; shall be well paid if it takes all I have.'" The witness was seventeen years old at the time of the trial. The conversation occurred in 1883. There were several other witnesses examined, and the scope of their testimony was, that the testator had declared that if the plaintiff would take care of him he should be well paid.

All this is very unsatisfactory. It would be so, to prove a contract between strangers, and it does not measure up to the standard required between parent and child. Such loose declarations can always be proved in a contest between a man and his father's estate. In *Leidig* v. *Coover*, 47 Pa. St. 534, it was held that the declarations of a testator that his daughter should be paid for what she had worked over age are not sufficient evidence of a contract as would enable her to recover; nor was it material that during a part of that time she had resided away from the homestead upon another farm belonging to him. In that case it was said by Mr. Justice Agnew: "The declarations of a parent may admit the filial devotion and real worth of his child, and the profit he may derive from her services. They may reach further, and disclose his own sense of obligation and his settled purpose to compensate. But all this is insufficient to raise a promise." This is in the direct line of our cases: See *Candor's Appeal*, 5 Watts & S. 513; *Hertzog* v. *Hertzog*, 29 Pa. St. 465; *Mosteller's Appeal*, 30 Id. 473; *Hack* v. *Stewart*, 8 Id. 213; *Lynn* v. *Lynn*, 29 Id. 369; *Ulrich* v. *Arnold*, 120 Id. 170. In *Candor's Appeal*, *supra*, it was said by Justice Rogers: "In *Walker's Estate* we took occasion to express our reluctance with which we listen to claims for wages by a son against the estate of a deceased parent, and subsequent experience has not changed or modified the opinion then entertained. It is pregnant with danger, as we

verily believe, as well to the rights of creditors as to the other heirs, and cannot, of course, be entitled to countenance from the court, unless accompanied with clear proof of an agreement not depending upon idle and loose declarations, but on unequivocal acts of the intestate, as, for example, a settlement of an account, or money paid by the father to the son as wages, distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant." The cases cited by the plaintiff do not conflict with this view. *Longenecker* v. *Pennsylvania R'y Co.*, 105 Pa. St. 328, and *Ott* v. *Oyer*, 106 Id. 6, have no bearing upon the case; while in *Neel* v. *Neel*, 59 Id. 347, and *Titman* v. *Titman*, 64 Id. 483, a contract much more distinct in terms had been proved. The amount of compensation was shown in each case.

There was nothing of the kind in the case in hand. How much was to be paid? when, and for what services? Nothing of this kind appears. And it is one of the remarkable facts incident to this class of cases that the claim for compensation is seldom or never presented to the decedent during his life, but is always left to vex his legal representatives and heirs after his death. It is not too much to say that this testator, who was the owner of a small estate, would probably have been astonished had his son presented a claim before his death of twelve hundred dollars for his services for the two years preceding. Where a contract of this nature is expressly proved, both as to the nature of the services and the amount to be paid, or can be shown by circumstances which are unequivocal in their nature, such as the settlement of accounts, it is all very well. A man has a right to do what he will with his own. But when a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged parent, he must come here with some better proof than loose declarations of gratitude and of an intention to compensate made by an old man in the extremity of his last sickness.

Judgment affirmed.

PARENT AND CHILD — WHO ENTITLED TO CHILD'S EARNINGS. — During his lifetime, the father is entitled to the services and earnings of his minor children: *Gilley* v. *Gilley*, 79 Me. 292; 1 Am. St. Rep. 307; *Halliday* v. *Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note. But a father may emancipate his minor child whenever he sees fit to do so; and will not thereafter be entitled to the earnings or wages of such child: *Wilson* v. *McMillan*, 62 Ga. 16; 35 Am. Rep. 115, and note 117–121; *Shortel* v. *Young*, 23 Neb. 409; *Allen* v. *Allen*, 60 Mich. 635; *McCarthy* v. *Boston etc. R. R. Corp.*, 148 Mass. 550.

BOYER *v.* BOLENDER.

[129 PENNSYLVANIA STATE, 324.]

CONTRIBUTION AMONG WRONG-DOERS. — One of several joint wrong-doers cannot, by paying off a judgment obtained against them all, and taking a fictitious and fraudulent assignment of the judgment in the name of his son, enforce contribution from the other wrong-doers.

BILL in equity was filed by H. S. Boyer, as receiver of the Mahoney etc. Life Association, against Philip Hillbish, S. H. Yoder, Daniel Bolender, and others, alleging that they were directors and officers of such association, and had fraudulently converted to their own use large sums of money belonging thereto. A decree was entered against them for $18,853.73. A *testatum fieri facias* was issued and executed, and all of the money collected from defendants, except three thousand four hundred dollars. This money was paid by W. P. Hillbish, a son of defendant Philip Hillbish, to the sheriff, and an assignment of the amount made by the receiver to W. P. Hillbish, but the evidence shows that this money was furnished by Philip Hillbish, procured upon his credit, and afterwards repaid by him, and that the son never possessed so much money nor the credit upon which to procure it. One of the defendants afterwards paid to Philip Hillbish two thousand five hundred dollars, which was credited on account of the three thousand four hundred dollars which had been assigned. Subsequently, the assignee, W. P. Hillbish, issued an *alias testatum fieri facias* directed to the sheriff, who levied on the property of Daniel Bolender and S. H. Yoder sufficient to satisfy the balance of the three thousand four hundred dollars which remained unpaid. Bolender and Yoder presented their petition, asking that W. P. Hillbish show cause why the *fieri facias* should not be stayed, and the judgment upon which it was founded be declared satisfied. The prayer of the petition was granted, and the plaintiff assigns error.

William A. Sober, for the appellant.

Charles Hower, for the appellees.

PAXSON, C. J. There appears to have been a writ of error as well as an appeal in the above case. We need not say which was the proper remedy, as both lead to the same result. To state the case briefly, it was an attempt on the part of one wrong-doer to enforce contribution from the others who participated in the wrong. This, under all the authorities, can-

not be done. We need not refer to them, as they are cited in the opinion of the learned judge below, which so fully covers the ground that we may well decline any extended discussion of the case. It was contended, however, that because the judgment had been marked to the use of William P. Hillbish, the authorities referred to do not apply. It is true, he was not one of the original wrong-doers, but the court below has found, upon sufficient evidence, that he was a mere man of straw, and that the real actor was his father, who was admittedly one of the wrong-doers. Nor were the defendants below compelled to set up their own turpitude in order to entitle them to relief. If such had been the case, the learned judge below might, perhaps, have hesitated to interfere. Nor did it need any astuteness in the court below to discover the fraud. It appeared upon the face of the proceedings. The record was saturated with it, and it came within his judicial knowledge.

The case is affirmed, both upon the writ of error and the appeal, and the latter is dismissed at the costs of the appellant.

CONTRIBUTION AMONG WRONG-DOERS. — As to the effect of a release to or satisfaction accepted from one of several wrong-doers, see extended note to *Seither* v. *Philadelphia Tr. Co.*, 11 Am. St. Rep. 906–909. A wrong-doer cannot escape liability, if his acts contribute to the injury done, merely because his proportionate contribution to the result cannot be accurately measured: *Learned* v. *Castle*, 78 Cal. 454; and all joint wrong-doers are liable, civilly, for the injuries inflicted by their acts: *Sharpe* v. *Williams*, 41 Kan. 56; *Fisher* v. *Cook*, 125 Ill. 280. An accord and satisfaction by one of several wrong-doers is a satisfaction as to all: *Atwood* v. *Brown*, 72 Iowa, 723.

COMMONWEALTH *v.* NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY.

[129 PENNSYLVANIA STATE, 463.]

FOREIGN CORPORATIONS — TAXATION OF — CONSTITUTIONAL LAW. — Section 4 of Pennsylvania act of June 30, 1885, providing for the taxation of the indebtedness of all corporations doing business within the state, and the collection of such tax by the corporation, is a proper exercise of legislative power, and applies as well to foreign as to domestic corporations doing business within the state.

FOREIGN CORPORATIONS — CONDITIONS WHICH MAY BE IMPOSED UPON. — A corporation of one state cannot do business in another without the latter's consent, express or implied. That consent may be accompanied with such conditions as the state may impose, so long as they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the state, or do not enforce condemnation without opportunity for defense.

FOREIGN CORPORATIONS — TAXATION OF — CONDITION WHICH MAY BE IMPOSED UPON. — State legislature may impose, as a condition upon foreign corporations doing business within the state, that they shall assess and collect a tax upon that portion of their loans in the hands of individuals resident within the state; and continuing in business after the imposition of such condition will be taken as an assent thereto.

FOREIGN CORPORATIONS — IMPLIED CONDITION AGAINST. — There is an implied condition, both as to foreign and domestic corporations, that they will be subject to such reasonable regulations in respect to the general conduct of their affairs as the legislature may, from time to time, prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted.

FOREIGN CORPORATION — TAXATION OF — CONSTITUTIONAL LAW. — A foreign corporation which by private statute is allowed to do business within the state upon the payment of a stipulated sum annually may by subsequent statute be compelled to assess and collect a tax upon that portion of its loans held by residents within the state, without violating the contract between the state and the corporation.

M. E. Olmsted, for the appellant.

William S. Kirkpatrick, attorney-general, and John F. Sanderson, deputy attorney-general, for the commonwealth.

CLARK, J. This case came into the common pleas of Dauphin County upon an appeal from a settlement made by the auditor-general, etc., for state taxes on corporate loans, under the fourth section of the act of June 30, 1885, for the year 1887. It was tried by the court by agreement of the parties under the act of 1874. The learned judge of the court below found as matter of fact that two million three hundred and seventy-eight thousand dollars of the company's bonds were owned and possessed by residents of Pennsylvania, of which eight hundred and fifty-two thousand dollars were held by individuals, and the residue by corporations. The principal questions raised on this record are ruled by *Commonwealth* v. *Delaware Div. Canal Co.*, 123 Pa. St. 594; *Lehigh Valley R. R. Co.* v. *Commonwealth*, and *Commonwealth* v. *Lehigh Valley R. R. Co.*, the last two cases decided at this term, and reported in 129 Pa. St. 429. The only remaining question for our consideration is, whether or not the defendant company, being a foreign corporation, is liable to be charged with state taxes at the rate of three mills on the dollar on their bonds held by individuals and firms resident within the state, as above stated.

The New York, Lake Erie and Western Railroad Company is a corporation of the state of New York. It was originally incorporated in the year 1832, as the New York and Erie Railroad Company, with power to construct a railroad from the

city of New York to Lake Erie through the southern counties of the state of New York. To avoid certain engineering difficulties, the company was afterwards authorized by the legislature of Pennsylvania, under certain restrictions, to build a specific portion of its road through the counties of Pike and Susquehanna, in this state: Acts of February 16, 1841 (Pamph. Laws, 28), and March 26, 1846 (Pamph. Laws, 179); the said company, by the act of 1846, being required to pay to the state of Pennsylvania, after the completion of the road, the sum of ten thousand dollars annually. The property and franchises of the New York and Erie Railroad Company afterwards became vested in the Erie Railway Company, and in 1878 in the New York, Lake Erie, and Western Railroad Company. A portion of the defendant's road was made and is still maintained within the limits of this state, and since the completion and equipment of the road regular payment has been made by the company to the commonwealth of the said sum of ten thousand dollars annually, pursuant to the provisions of the several acts of assembly already referred to. Although a corporation of another state, and therefore a foreign corporation, the company is doing business in this state. By a certificate filed in the office of the secretary of the commonwealth, pursuant to the act of the 22d of April, 1874, the defendants have designated a place of business and an agent to represent them; they are therefore not only duly authorized, but in the operation of their road they are actually engaged in doing business within the limits of this state.

The fourth section of the act of 1885 applies not only to all private corporations created by and under the laws of this state or of the United States, but to such as are doing business in this commonwealth. The several questions raised by the assignments of error, from the first to the ninth, inclusive, as we have already said, have been discussed and decided in the case of *Commonwealth* v. *Delaware etc. Canal Co.*, 123 Pa. St. 594, and the case of *Commonwealth* v. *Lehigh Valley R. R. Co.*, 129 Id. 429, argued at the present term, and will not be considered here

The only questions raised by the remaining assignments are,—1. Whether the provision of the fourth section of the act of 1885, so far as it applies to foreign corporations doing business in this state, is a proper exercise of legislative power; and 2. Assuming this to be so, whether there is anything in the said provision by which the defendant road was permitted

to pass through the counties of Pike and Susquehanna which would exempt the company from the obligation of this act.

Upon the first question suggested there can, we think, be but little room for discussion. In the Delaware etc. Canal Company case, already referred to, we said:—

"Foreign corporations, exercising their franchises under the laws of other states and countries, are beyond the reach of our processes of taxation. We could not require them ordinarily to comply with any such regulation of our law, and therefore they are necessarily excluded from the provisions of the act. Such foreign corporations as are engaged in business in the state might doubtless be required to comply as a condition of their right so to do; but this could only embarrass the action of the local assessor, and upon this ground, doubtless, they were wisely excluded from the operation of the act."

The last member of the concluding sentence of the paragraph quoted is a mere inadvertence. The fourth section of the act of 1885 does in terms embrace such foreign corporations as are engaged in business in this state, and the question now to be considered is, whether or not such a provision as respects the New York, Lake Erie, and Western Railroad Company is a proper exercise of the legislative power of the state. The general statement that foreign corporations are ordinarily beyond the reach of our processes of taxation is undoubtedly correct; but when a foreign corporation comes into Pennsylvania, and engages in business here, undoubtedly it does so subject to the general policy of and the course of legislation in the state: *Runyan* v. *Coster*, 14 Pet. 122. A foreign corporation can exercise its franchises in Pennsylvania only so far as it may be permitted by the local sovereign. The right rests wholly in the comity of the states: *Paul* v. *Virginia*, 8 Wall. 168. A corporation of one state cannot do business in another state without the latter's consent, express or implied; and that consent may be accompanied with such conditions as the latter may think proper to impose: *St. Clair* v. *Cox*, 106 U. S. 350. These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the state, or in conflict with the rule which forbids condemnation without opportunity for defense: *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Pembina etc. M. Co.* v. *Pennsylvania*, 125 Id. 181.

It was competent for the legislature of Pennsylvania to

impose as a condition upon foreign corporations doing business in this state that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this state, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the state, and the corporation continuing its business subsequently would be taken to have assented thereto.

There is, however, a condition implied, even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted: *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this state as a matter of grace and not of right? But it is said that the enforcement of the fourth section of the act of 1885 against the defendant corporation would impair the obligation of the contract existing between the commonwealth and the company, as set forth in the private statutes of 1841 and 1846, already referred to. Apart from these statutes, the defendant had the right, by the comity of the states, to contract and to sue within the state of Pennsylvania, but could exercise no extraordinary franchises or special privileges granted by the state incorporating it, as, for instance, the right to eminent domain, or the privilege of exemption from taxation: *State* v. *Boston etc. R. R. Co.*, 25 Vt. 433; *Middle Bridge Co.* v. *Marks*, 26 Me. 326; Taylor on Corporations, 386. It was for the exercise of this extraordinary privilege and power of the state, the annual payment of ten thousand dollars was stipulated. There is nothing in the act to indicate that this sum was paid in lieu of taxes, or for exemption from any duty which might otherwise be imposed upon the company, but for the privilege of exercising the right of eminent domain in the location of their road through the counties mentioned, under restrictions particularly specified. The effect of these acts of 1841 and 1846 was not to declare

the company a corporation of the commonwealth, but, as Mr. Justice Thompson said in *New York etc. R. R. Co.* v. *Young*, 33 Pa. St. 175, "for the purposes of these acts, the rights involved are to be tested and judged by the same rules of law as if the company had been primarily incorporated by this commonwealth. So far as the road runs through this state under the privileges granted to it, the company is a *quasi* Pennsylvania corporation. The right of eminent domain, within the restrictions of the grant, was as fully conferred on them by the act of February 16, 1841, as it ever is conferred on corporations exclusively within the state, and their rights and duties under the privileges granted must be ruled by the same principles." One state may make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad* property within its territorial jurisdiction: *Baltimore etc. R. R. Co.* v. *Harris*, 12 Wall. 65–82; *Graham* v. *Boston etc. R. R. Co.*, 118 U. S. 168. Thus it will be seen that the defendant exercises powers and franchises which they have received directly from the legislation of Pennsylvania; that a part of their property is actually within the limits of this state, and receives the protection of our laws, and there is no good reason why the company should not be held subject to the same regulations as corporations of our own state. We are of opinion that on this branch of the case the court was right.

The judgment is affirmed.

FOREIGN CORPORATIONS. — As to taxation of foreign corporations: Extended note to *Phœnix Ins. Co.* v. *Commonwealth*, 96 Am. Dec. 338–345; *San Francisco* v. *Liverpool etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425.

FOREIGN CORPORATIONS, STATUTES IMPOSING PARTICULAR CONDITIONS AND RESTRICTIONS UPON: Note to *Hollida* v. *Hunt*, 22 Am. Rep. 67–70.

LEGISLATIVE POWER OVER FOREIGN CORPORATIONS. — While the legislature may regulate or restrict the business of foreign corporations within the state, it cannot do so where it operates upon interstate commerce: *State* v. *Indiana etc. Co.*, 120 Ind. 575; *Gulf etc. R'y Co.* v. *State*, 72 Tex. 404; 13 Am. St. Rep. 815.

MACRUM *v.* MARSHALL.

[129 PENNSYLVANIA STATE, 506.]

STATUTE OF LIMITATIONS — NEW PROMISE. — An agreement by an indorser that a holder may sell, for less than its face value, a judgment against the maker for the full amount of a note, and a renewal of such agreement, with a waiver "of any statute plea thereon," is not such acknowledgment of indebtedness as will remove the bar of the statute of limitations.

STATUTE OF LIMITATIONS — NEW PROMISE. — An acknowledgment of indebtedness, to take a case out of the operation of the statute of limitations, must be clear and unambiguous, and must recognize and be directed to the debt with sufficient clearness to amount to an unqualified admission that it remains due and unpaid.

A. M. Imbrie, for the appellant.

George W. Guthrie and W. Macrum, for the appellee.

WILLIAMS, J. The controversy in this case lies within very narrow limits. Stephen Woods was the maker of a promissory note for fifteen hundred dollars, dated September 8, 1875, and payable to Robert Woods at the Allegheny Savings Bank. It was indorsed by the payee, and by Thomas M. Marshall, the plaintiff in error. At the maturity of the note, on November 10, 1875, the maker was unable to provide funds for its payment, and the indorsers made a written waiver of protest. An action was brought against the maker, and a judgment obtained for the amount of the note and interest, at the suit of the savings bank, but no action was brought against the indorsers. Nothing appears to have been collected on the judgment against Stephen Woods, but some one offered the bank five hundred dollars for it. Before accepting the offer, the bank applied to Mr. Marshall for his consent to the proposed sale, which he gave in writing, as follows:—

"I agree to sale of the judgment on this note against S. Woods for five hundred dollars, and agree to ratify same for M. Hay, trustee.

"Pittsburgh, May 6, 1880.

[Signed] "THOS. M. MARSHALL."

Nothing more was done, so far as Mr. Marshall was concerned, until May 5, 1886, six years, less one day, after the written consent to the sale of the judgment had been given, and more than ten years after the maturity of the note and the waiver of protest. At that time it appears that Mr. Marshall was asked to waive the statute of limitations on his

indorsement. This he declined to do, but he renewed his agreement of May 6, 1880, by a writing indorsed upon the same paper, in these words:—

"I renew the agreement of May 6, 1880, as of this date, and I waive any statute plea thereon.

"Pittsburgh, May 5, 1886."

The court below held this to be a waiver of the statute upon his liability as an indorser upon the note of Stephen Woods, and the correctness of this holding is the question in this case. The note matured on November 10, 1875. This suit was brought on May 6, 1886. The statute of limitations is an answer, *prima facie*, to the plaintiff's demand, and the burden is on the plaintiff to show that the bar of the statute has been tolled. The only evidence for this purpose is the agreement of May 6, 1880, renewed on May 5, 1886; and unless this shows a clear and distinct admission or recognition of the liability of Mr. Marshall for this debt, the plaintiff must fail. For what purpose was the agreement of May 6, 1880, asked by the bank, and given by the indorser? The bank held a judgment for the amount of the note and interest against Stephen Woods, the maker. The use of legal process had realized nothing upon it. The bank was offered five hundred dollars for an unconditional sale of it, and was evidently inclined to accept the offer, if this could be done safely. The danger was, that the indorser might insist that a sale of the judgment for less than its face was improvident and unnecessary, and treat it as a distinct ground of defense, if called upon to pay the balance. To settle this question, Mr. Marshall was asked to consent to the sale, which he did. By so doing, he said, in effect, to the bank: "If you attempt to compel payment of the note by me, whatever other defenses I may set up, I will not allege that you have sold this judgment for less than it was worth." The agreement is not inconsistent with any other line of defense than the specific one which was in the mind of both parties, and which is clearly referred to in the writing. Mr. Marshall might, with entire fairness, deny his indorsement, allege payment by him, or set up the statute of limitations, and yet be willing that the bank should realize whatever it could from its own judgment against Woods by a sale of it for the best price offered. The bank exercised a proper caution in asking the consent of the indorser to the sale. The indorser, if satisfied that the sale was a proper one, acted with fairness in giving his assent to

it. This was the only purpose for which the agreement was asked for by the bank or its representative. It is the only subject to which it relates, and it is the only line of defense on which it closes the mouth of him who signed it.

Coming down now to the agreement of May 5, 1886, we find it to be a renewal of that of May 6, 1880, and nothing more. Short as it is, it is tautological, and fully one half of it is unnecessary. It runs thus: "I renew the agreement of May 6, 1880, as of this date, and waive any statute plea thereon." The word "thereon" must refer to the agreement of May 6, 1880; but the sentence of which it is part is superfluous. The operative words of the agreement are these: "I renew the agreement of May 6, 1880." The words "as of this date" express the legal effect of the words preceding them, and neither add to nor take from that effect; they are wholly unnecessary. The same may be said of the remaining words, "and I waive any statute plea thereon." This had been already done by the agreement to renew as effectually as it was possible to do by any form of words whatever. The original agreement gave consent to the sale of the judgment for much less than its face. The agreement of May 5, 1886, renewed that consent. If there was danger that Mr. Marshall might be relieved from that consent by lapse of time, its renewal in express words removed that danger, and expressed his willingness to remain bound by it. Further than this the agreement was never intended or understood to go when originally made, and it is not probable that the renewal agreement would have received any other construction but for the unnecessary and meaningless words it contains.

The cases cited and relied on by the defendant in error are not in point. In *Finkbone's Appeal*, 86 Pa. St. 368, Wiley had given a receipt for money to be returned to Mary Finkbone, "in such amounts as she may want." He received another sum to be held in the same manner, and wrote the receipt therefor on the same piece of paper, and directly under the first, and then redelivered the paper to her. This was properly held to be an admission of the amount shown to be due on the face of the paper at the date of such last receipt and delivery. In *Wesner* v. *Stein*, 97 Id. 322, the rule is clearly stated that an acknowledgment, to take a case out from the operation of the statute, must be clear and unambiguous. It must recognize, and be directed to the debt with sufficient clearness, and must amount to an unqualified admission

that it remains due and unpaid. The words relied on in this case do not meet the test. They refer clearly to another subject, — the sale of the Woods judgment. If Mr. Marshall was now objecting to that sale, his agreement that it might be made ought to conclude him; but as he is defending upon wholly different ground, we do not see that he is affected by it in any manner.

Judgment reversed, and judgment is now entered in favor of the defendant on the question reserved. An opinion was filed in this case soon after it was heard, which we are informed by the prothonotary cannot be found. This opinion is now filed for that reason.

STATUTE OF LIMITATIONS. — As to what acknowledgment of a debt will remove the bar of the statute of limitations: See note to *State* v. *Finn*, 14 Am. St. Rep. 660.

DEAN *v.* PENNSYLVANIA RAILROAD COMPANY.

[129 PENNSYLVANIA STATE, 514.]

CONTRIBUTORY NEGLIGENCE OF DRIVER IMPUTED TO PASSENGER. — A driver of a private vehicle is under duty to stop, look, and listen before attempting to cross a railroad track, and failure to perform this duty makes him guilty of contributory negligence, barring recovery for injury from collision, and his negligence may be imputed to one who is riding with him by invitation and without compensation, and who knew the locality, and that a train was about due, that he was approaching the railroad track at a fast trot, and who sat with his back to the driver, and did not ask him to stop, look, or listen, or to permit him to get out.

CONTRIBUTORY NEGLIGENCE OF DRIVER WHEN IMPUTED TO PASSENGER. — The negligence of the driver of a private vehicle cannot be imputed to a party riding with him by invitation and without compensation when such party is free from blame; still, the latter is liable for his own negligence.

Edward Campbell, Thomas Patterson, and David Q. Ewing, for the appellant.

George B. Gordon, John H. Hampton, and William Scott, for the appellee.

CLARK, J. The plaintiff, Isaac N. Dean, whilst crossing the tracks of the defendant company's road at Frost station, Fayette County, in a wagon, on the morning of the 25th of November, 1882, was struck by the locomotive of a passing train, and this suit was brought to recover damages for the injury sustained through the alleged negligence of the defend-

ant on that occasion. The negligent act complained of is, that although the train was running at the rate of thirty or forty miles an hour, no sufficient warning of its approach to the crossing was given, either by blowing the whistle or ringing the bell.

On the part of the defendant it is contended that, assuming this to be so, the plaintiff, not only through the negligence of the driver of the wagon, but by his own negligence, contributed to the injury, and therefore cannot recover. William Fields was the owner of the horses and wagon, and was the driver. That he was guilty of negligence cannot be denied; it was his duty to anticipate the probable passage of trains on the railroad, and before attempting to cross the tracks, to stop, look, and listen for their approach; and this the plaintiff frankly admits Fields failed to do. When he left the corner of the Blackburn House, some three hundred feet distant from the crossing, he trotted his horses to the brow of the hill, a little more than half-way, and checking them there a little, he started down the hill at a fast trot to the railroad, where the collision occurred. Mr. Gilmore, an engineer called by the plaintiff, testifies that the locomotive and cars on the track were plainly visible to a person riding in a wagon on the public road, at almost any point, for a distance of thirteen hundred feet, subject to such temporary obstructions as might exist from intervening buildings and trees; and it is conceded on all hands that at a point ten feet from the railroad the track itself was visible for a quarter of a mile or more.

Having failed to stop, look, and listen before he undertook to cross the railroad tracks, Fields failed to perform a duty which the law plainly imposed upon him, and he was therefore guilty of negligence which contributed to the injury.

But can the negligence of Fields be imputed to Dean? In *Lockhart* v. *Lichtenthaler*, 46 Pa. St. 151, it was held that where a passenger in a carrier vehicle is injured by a collision resulting from the negligence of those in charge of it and those in charge of another vehicle, the carrier only is answerable for the injury; and this case was followed by *Philadelphia etc. R. R. Co.* v. *Boyer*, 97 Id. 91, where the same rule was applied. The decision in *Lockhart* v. *Lichtenthaler*, *supra*, was made by adopting the conclusion of the English courts in *Bridge* v. *Grand Junction R'y Co.*, 3 Mees. & W. 247 (1838), in the exchequer; *Thorogood* v. *Bryan*, 8 Com. B. 115, 65 Eng. Com. L. 114, and *Cattlin* v. *Hills*, 8 Com. B. 123 (1849), in

the common bench. These cases were followed in the exchequer in *Armstrong* v. *Lancashire and York R'y Co.*, L. R. 44 Ex. 89 (1875); L. R. 10 Ex. 47.

The principle upon which all these English cases appear to have been determined is, that the passenger is so far identified with the carriage in which he is traveling that want of care on the part of the driver will be a defense to the owner of the other carriage that directly causes the injury. In *Thorogood* v. *Bryan*, *supra*, which is the leading case, a passenger alighting from an omnibus was thrown down and injured by the negligent management of another omnibus, and it was held that an action would not be maintained against the owner of the latter, if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury. The rule asserted is one of general application, no matter whether the conveyances are public or private, or whether the party injured is conveyed at his own request, or at the request of the driver.

In *Lockhart* v. *Lichtenthaler*, *supra*, however, the rationale of the rule in *Thorogood* v. *Bryan*, *supra*, was not considered tenable; indeed, the reasons assigned for it in the English cases were expressly rejected, and the liability of the carrier was put upon different grounds,—the grounds of public policy. "I would say," says the learned judge, delivering the opinion of the court, "the reason for it is, that it better accords with the policy of the law to hold the carrier alone responsible in such instances as an incentive to care and diligence. The law fixes the responsibility upon a different principle in the case of a carrier, as already noticed, from that of a party that does not stand in that relation to the party injured; the very philosophy of the requirement of greater care is, that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own." It will be observed that, as the reasons assigned for the rule in *Lockhart* v. *Lichtenthaler*, *supra*, extend only to cases in which the party is injured by the joint negligence of his common carrier and another, the rule has no application to cases where the injured party's conveyance is private; and this was the ground upon which *Carlisle* v. *Brisbane*, 113 Pa. St. 544, 57 Am. Rep. 483, was decided. In that case, the conveyance

was private, the party injured being carried without compensation, and both of the negligent parties held to the same degree of care and negligence. The doctrine of *Lockhart* v. *Lichtenthaler*, *supra*, was therefore not applicable.

The principle of *Thorogood* v. *Bryan*, *supra*, has been approved in some of the states, and in others it has been rejected as altogether indefensible. It has been recognized and sustained in Vermont: *Carlisle* v. *Sheldon*, 38 Vt. 440; in Wisconsin: *Houfe* v. *Fulton*, 29 Wis. 296; 9 Am. Rep. 568; *Prideaux* v. *Mineral Pt.*, 43 Wis. 513; 28 Am. Rep. 558; *Otis* v. *Janesville*, 47 Wis. 422; and in Iowa: *Payne* v. *Chicago etc. R. R. Co.*, 39 Iowa, 523. On the other hand, the doctrine has been declared unsound and untenable by the supreme court of the United States in the very recent case of *Little* v. *Hackett*, 116 U. S. 366. The doctrine has also been disapproved and rejected in New York: *Robinson* v. *New York etc. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1; *Dyer* v. *Erie R'y Co.*, 71 N. Y. 228; *Masterson* v. *New York etc. R. R. Co.*, 84 Id. 247; 38 Am. Rep. 510; in New Jersey: *Bennett* v. *New Jersey etc. Transp. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *New York etc. R'y Co.* v. *Steinbrenner*, 47 N. J. L. 161–171; 54 Am. Rep. 126; in Maine: *State* v. *Boston etc. R. R. Co.*, 38 Alb. L. J. 269; in Ohio: *Transfer Co.* v. *Kelly*, 36 Ohio St. 86–91; 38 Am. Rep. 558; in Illinois: *Wabash etc. R'y Co.* v. *Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; in Kentucky: *Danville Turnpike Co.* v. *Stewart*, 2 Met. 119; *Railroad Co.* v. *Case*, 9 Bush, 728; in California: *Tomkins* v. *Clay St. R. R. Co.*, 66 Cal. 163; in New Hampshire: *Noyes* v. *Town of Boscawen*, 64 N. H. 361; 10 Am. St. Rep. 410; in Minnesota: *Follman* v. *City of Mankato*, 35 Minn. 522; 59 Am. Rep. 340; in Michigan: *Cuddy* v. *Horn*, 46 Mich. 596; 41 Am. Rep. 178; and in Maryland: *Philadelphia etc. R. R. Co.* v. *Hogeland*, 66 Md. 149; 59 Am. Rep. 159; whilst in Pennsylvania, as we have already stated, the rule has been but partially adopted, and the reasons given by the English courts have been expressly rejected. In some of the states, as in Wisconsin, Michigan, and Iowa, a distinction would appear to have been taken between a public and a private conveyance; and as an examination of the cases cited will show, it has been there held that when the injured person is riding in a private conveyance by invitation of the driver, and without compensation, the driver will be regarded as his agent, and upon that ground the negligence of the latter is imputed to the former. In Pennsylvania, New York, Ohio, Minnesota,

and other states, this doctrine of agency is expressly repudiated, and it is held that in such cases the driver's negligence cannot be so imputed. Thus it will be seen that the cases are conflicting; the rulings in England and in this country have been in the greatest confusion, which we think is attributable to the fact that the general rule of *Thorogood* v. *Bryan*, *supra*, which for thirty-eight years was followed in England and in parts of this country, was rested upon wholly indefensible ground. The vain effort to sustain a rule of law, which was at variance with reason and common sense, has given rise to these various conflicting views and decisions.

The English court of appeals, however, in a very recent case, the *Bernina*, *Armstrong* v. *Mills*, 12 Prob. & D. 58, decided in January, 1887, expressly overrules the case of *Thorogood* v. *Bryan*, *supra*, and holds that one who is a passenger in a public conveyance does not identify himself with the conveyance, or the persons in charge of it, and that their negligence, direct or contributory, can in no respect be imputed to him. In the judgment of the court, Lord Esher, M. R., after an extended review of the English and American cases, said: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood* v. *Bryan*, 8 Com. B. 115, we cannot see any principle on which it can be supported; and we think that, with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is erroneously unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it, at this time, in a court of appeals, it is a case which, from the time of its publication, has been constantly criticised, and no one can have gone into or have abstained from going into an omnibus, railroad, or ship, on the faith of the decision. We therefore think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood* v. *Bryan*, 8 Com. B. 115, must be overruled." See *Carlisle* v. *Brisbane*, 57 Am. Rep. 483–570. In the case of *Little* v. *Hackett*, *supra*, in the supreme court of the United States, Mr. Justice Field, delivering the opinion, says: "The truth is, the decision in *Thorogood* v. *Bryan*, *supra*, rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his co-operation or

encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

Quotations might be given from many cases in the different states, illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England, and the great current of authorities of this country, are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion, there is no principle consonant with common sense, common honesty, or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another, imputed to him under such circumstances. Although in *Carlisle* v. *Brisbane*, *supra*, I may appear to have accepted that doctrine, I meant merely to state that the ground upon which this court had rested this rule was better than that taken by the English courts.

But if this were not so, Fields was not a common carrier; Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle* v. *Brisbane*, *supra*, and to the case of *Follman* v. *City of Mankato*, 35 Minn. 522; 59 Am. Rep. 340. We are clearly of opinion that if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him; but it is in this respect this case differs from *Carlisle* v. *Brisbane*, *supra*. In the case just cited, Brisbane was a stranger; the accident occurred after night and after a fresh fall of snow; it was caused from a defect in the street. There was no evidence whatever that Brisbane knew that Corriman was a reckless or unskillful driver, or that he (Brisbane) saw, or by the exercise of reasonable care at the time could see, or ought to have seen, the dangerous condition of the street; indeed, the jury found that he was not personally aware of either, and no question was raised involving that view of the case.

Here, however, the facts are of a different character. Dean knew the locality well; he had crossed the tracks frequently at this point; he knew that a train was due about that time, and that he was approaching the railroad track at a fast trot; yet he took no precautions. He was certainly responsible for his own negligence; he sat with his back to the driver, and although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look and listen, or to permit him (Dean) to get out; and the danger was as obvious to Dean as it was to Fields. The testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields; that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Crescent Township* v. *Anderson*, 114 Pa. St. 643; 60 Am. Rep. 367.

The judgment is affirmed.

IT IS THE DUTY OF ALL PERSONS WHO GO UPON OR ACROSS RAILWAY TRACKS to stop, look, and listen for approaching trains, and a want of such care will constitute contributory negligence: *Cooper* v. *Lake Shore etc. R'y Co.*, 66 Mich. 261; 11 Am. St. Rep. 482, and note.

IMPUTED NEGLIGENCE. — The negligence of the driver of a vehicle is not imputed to a passenger therein, when such passenger is free from personal negligence, and has no control over the driver, and has been guilty of no want of care in selecting his vehicle and driver: *Noyes* v. *Boscawen*, 64 N. H. 361; 10 Am. St. Rep. 410, and note referring to the case of *Thorogood* v. *Bryan*, at page 419; compare also *Nesbit* v. *Town of Garner*, 75 Iowa, 314; 9 Am. St. Rep. 486, and note.

BONNERT *v.* PENNSYLVANIA INSURANCE COMPANY.

[129 PENNSYLVANIA STATE, 558.]

INSURANCE — WAIVER OF CONDITION. — A condition in an insurance policy requiring suit to be brought within six months after the loss may be waived, and such waiver need not be express, but may consist of the acts and conduct of the company and its officers which throw the insured off his guard, and lull him into security until the expiration of the time mentioned in the condition.

INSURANCE — DUTY OF COMPANY AS TO CONDITIONS IN ITS FAVOR. — When an insurance company attempts to defeat a recovery upon a policy upon a condition for its own benefit, and which deprives the assured, no matter how honest his claim, of the indemnity which he paid for, the company must be held to entire good faith, and the breach of condition must be promptly taken advantage of. Nothing else must be alleged as a reason for non-payment, and the insured must not be led astray by proposing settlement on grounds other than the alleged breach of condition.

INSURANCE — WAIVER OF CONDITION QUESTION FOR JURY. — A limitation or condition in a policy of insurance intended for the benefit of the company may be waived by it, and the fact of such waiver is a question for the jury.

INSURANCE. — WAIVER OF CONDITION IN POLICY OF INSURANCE in favor of the company need not be express. It may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken, or even from denial of obligation exclusively for other reasons.

Harry Alvan Hall, George W. Allen, and Charles Corbet, for the plaintiff in error.

Cadmus Z. Gordon, for the defendant in error.

PAXSON, J. This was an action of *assumpsit* in the court below, brought upon a policy of insurance, to recover the amount of loss caused by the destruction by fire of the insured property. The plaintiff kept a small country store in Jefferson County, and obtained a policy of insurance from the defendant company in the sum of one thousand dollars, covering the storehouse building and the stock of merchandise contained therein. On the twenty-fifth day of March, 1887, the premises were destroyed by fire, and the plaintiff alleges that he sustained loss to the amount of three thousand five hundred dollars. Notice of the fire was immediately given to the agent of the company, and within thirty days after the fire the plaintiff made out proofs of loss as required by the policy, together with the various certificates, and forwarded them to the company. Divers negotiations, resulting in nothing but delay, followed; and on November 29, 1887, the plaintiff commenced this suit in the court below. Upon the trial, he was met with a condition in the policy which required the suit to be commenced within six months after the fire. As this condition had not been complied with, the court below entered a judgment of nonsuit against him.

For anything that appears in this record, the plaintiff's claim was free from fraud, and the loss an honest one. If he fails to get the indemnity he bargained for when he effected his insurance and paid his money, it is because of a condition in his policy to which he assented, or to which he must be presumed to have assented. The plaintiff complains, however, that this condition of the policy was waived, not by express words, but by the acts and conduct of the company and its officers, which threw him off his guard, and lulled him into security. When an insurance company attempts to defeat a recovery upon a policy upon a condition which was intended

solely for its own benefit, and which deprives the assured, however honest his claim may be, of the indemnity which he paid for, it is not too much to hold the company to entire good faith. The breach of condition must be promptly taken advantage of. Nothing else must be alleged as a reason for non-payment, and especially must not the insured be led astray by proposing settlement on grounds other than the alleged breach of condition: *Ben Franklin Ins. Co.* v. *Flynn*, 98 Pa. St. 627. A limitation or condition in a policy of insurance intended for the benefit of the corporation may be waived by it; and the fact of waiver is a question for the jury: *Coursin* v. *Pennsylvania Ins. Co.*, 46 Id. 323. It was said by Mr. Justice Thompson, in delivering the opinion of the court in the case just cited: "If it [the company] acted and promised, after the action was legally barred, as if it did not intend to insist on the limitation, and put the party to trouble, expense, and anxiety in regard to his claim, they need not complain of a jury finding that they did waive it. Under such circumstances, juries will be very likely to do so; and sometimes, probably, on pretty slight evidence." There is a long line of cases which hold that the waiver need not be express. It may be inferred from the acts of the insurers evidencing a recognition of liability, or even from their denial of obligation exclusively for other reasons. It is sufficient to refer to one of our latest cases: *Lebanon M. F. Ins. Co.* v. *Erb*, 112 Id. 149. It was said by Mr. Justice Gordon, in *Pennsylvania F. Ins. Co.* v. *Dougherty*, 102 Id. 568: "*Prima facie*, the insured is entitled to have his loss made good immediately upon its happening; and when the loss appears to be an honest one, we are not disposed to scan very strictly the evidence which tends to rebut a technical forfeiture of the right to payment."

It remains to test the facts of this case by the light of these decisions. As the court below nonsuited the plaintiff, he is entitled to all the inferences which may be fairly deduced from the testimony produced by him. We have, then, the facts that notice of the fire and full and sufficient proofs of loss were furnished the company, in accordance with its rules, and within the time prescribed, and that, in obedience to a call from the company, he sent them, in the month of June, all the books and papers in his possession throwing any light upon the subject of his loss. It was the duty of the company to examine the books and papers promptly, and notify the plaintiff of the result. Instead of doing so, they kept them

until the limitation had expired, and then only returned them after a demand therefor. The effect of this was to throw the plaintiff off his guard, and to lull him into security. Why should he commence suit against the company so long as they were investigating the case, and had all his papers? Good faith required that the plaintiff should have had a plain answer, yes or no, to his demand for payment, and that such answer should have been given before the limitation had expired. The conduct of the company, in this respect, has about it the unmistakable and unsavory flavor of sharp practice. The pretext for all this delay was of the flimsiest character. The company was calling for books and papers which the plaintiff did not have. He had already sent them all. If insufficient for the purpose for which they were sent, they should have been promptly returned, with notice that the company would not pay. The question of their sufficiency could then have been passed upon by a court and jury. We also find that, as late as October 5th, after the limitation had expired, Mr. Allewelt, the adjuster of defendant company, wrote to plaintiff's attorney, saying that when he gets all the books and papers asked for he will make the examination as speedily as possible and return them. I attach no importance to the allegation that, at this time, Mr. Allewelt was not the adjuster of the defendant company. He has been acting as such from the beginning, and cannot now be allowed to play fast and loose.

We need not discuss the case further. The question of waiver was for the jury, and we think there was sufficient evidence upon this point to submit to them. It follows that it was error to direct a nonsuit.

The judgment is reversed, and a *procedendo* awarded.

INSURANCE. — An insurance company may, and often does, waive conditions inserted in policies, the breach of which would otherwise cause a forfeiture of the policies: *Newman* v. *Covenant Mut. Ins. Ass'n*, 76 Iowa, 56; 14 Am. St. Rep. 196, and particularly cases in note. And a waiver of forfeiture of a policy of insurance, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel; and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture: *Queen Ins. Co.* v. *Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and note.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY *v.* JAMES.

[73 TEXAS, 12.]

VERDICT, THOUGH NOT ALTOGETHER CERTAIN, WILL BE UPHELD when its meaning can be made manifest beyond doubt by reference to the entire record.

NEW TRIAL. — Granting an order for a new trial on the motion of a defendant, who, with other defendants, is jointly and severally sued, vacates the former judgment, and operates as a new trial as to all of the defendants.

VERDICT AGAINST ONE OF SEVERAL WRONG-DOERS, VALIDITY OF. — In actions growing out of that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence, each of the wrong-doers when sued is compelled to bear the responsibility of all. Therefore, the fact that a verdict is found against one of such defendants without mentioning his co-defendants will not alone be sufficient to impair its validity.

VALIDITY OF VERDICT IS NOT IMPAIRED simply because it is capricious and inconsistent; that fact alone will not authorize reversal when there is nothing else in the record tending to show misconduct.

MALICIOUS PROSECUTION — PROBABLE CAUSE, WHEN A QUESTION FOR JURY. — When, in an action of malicious prosecution, the facts are in controversy, the question of probable cause must go to the jury, after the court has properly defined it, and given such instructions as will enable the jurors to draw correct conclusions from the facts as they find them.

MALICIOUS PROSECUTION — PROBABLE CAUSE — MALICE — VERDICT. — When, in an action for malicious prosecution, the jury find both want of probable cause and malice, and return actual damages, when they might have assessed exemplary damages, this is no ground for setting aside the verdict, for the reason that such finding indicated that there was no malice.

MALICIOUS PROSECUTION — PRINCIPAL AND AGENT. — THE GENERAL MANAGER OF A RAILROAD who has the entire control and management of the

business interests of the company may have the right to institute a prosecution for perjury on behalf of the company, and with this right goes a corresponding liability on the part of the company to answer in damages if the right is exercised without probable cause.

MALICIOUS PROSECUTION. — PROBABLE CAUSE is not conclusively established by proof that defendant acted under the advice of counsel. This is only a circumstance showing want of malice, and supporting the defense of probable cause.

R. S. Walker, M. C. McLemore, and J. W. Terry, for the appellant.

F. Charles Hume and Howard Finley, for the appellee.

HOBBY, J. This suit for damages grew out of the arrest and alleged malicious prosecution of the appellee, James, for the offense of perjury, by the appellant acting through its general manager, Webster Snyder, and Spillane, his clerk, acting under said manager's directions, all of whom are jointly and severally sued. The petition contains all of the allegations necessary to maintain the action.

The defense was a general denial, plea of *res adjudicata*, probable cause, and that appellant acted without malice. Exceptions were sustained to the plea of *res adjudicata*. A trial resulted in a verdict for the plaintiff against the appellant alone for the sum of eight thousand dollars actual damages, upon which judgment was rendered against appellant for that sum in favor of the plaintiff, and the defendants Snyder and Spillane were discharged with their costs.

The affidavit made by Spillane, upon which the arrest and prosecution of James was had, charged that in a civil cause pending in the district court of Galveston County, wherein one A. W. Fly was plaintiff and appellant was defendant, brought to recover damages for personal injuries caused by the derailment and wreck of a passenger train of appellant, the said James testified by deposition falsely, willfully, and knowingly as follows: "I saw a loose wheel on a hind passenger-coach with a hot box [referring to a passenger train of appellant at Rosenberg about the 20th or 25th of April, 1884], and the car-inspector of appellant packing said box. The wheel had slipped from its proper bearings, and the axle had worn bright by the friction of the wheel. The car-inspector of appellant and the Sunset route were both present and saw the condition of the wheel; and while the box was being packed the inspector of the Sunset route remarked 'that if the car was on his line he would set it out.' This remark was made in my

hearing; cannot remember the exact conversation that took place, but it was to the effect that it was dangerous to send that car on. I was under the impression that the car would be set off, but when I saw the train go on remarked to the inspector of appellant, 'it was a d—d bad job.' He remarked: 'I guess she'll run.' I saw the train on its arrival at Rosenberg depot; it was not in a condition to proceed on its journey with safety in consequence of the wheel of one of the coaches being loose; am satisfied the train was wrecked in consequence of the condition of the wheel. Appellant's inspector afterwards told me he was required to report the condition of the train on the morning of the accident, and asked me what he should say. I told him to tell the truth. He said he would do no such thing; he would report only a few hot boxes. On the morning of the day of the accident one of appellant's coaches had one loose wheel; my attention was attracted by the condition of the wheel; it was so glaring I could not pass it unnoticed. I did not ask Snyder, general manager of appellant, for a position on his road, or intimate that I desired one."

Under the first assignment the objection is made that the verdict is not responsive to the charge, which directed the jury in the event their verdict should be against some of the defendants, and not all of them, the verdict should state the defendant or defendants against and in favor of whom the jury should find.

This objection is one which we think goes rather to the form than the substance of the verdict.

All of the defendants were sued, and the verdict was in plain language "in favor of plaintiff against the defendant the Gulf, Colorado, and Santa Fé Railway Company." The verdict by necessary implication found in favor of the defendants Snyder and Spillane. If they entertained any doubt as to that, it could have been corrected at the time. There was certainly no ambiguity in the verdict as to appellant. In cases where the verdict was not altogether certain, it has been uniformly held in this state that it should be upheld when its meaning can be made manifest beyond doubt by reference to the entire record: *Pearce* v. *Bell*, 21 Tex. 691; *Avery* v. *Avery*, 12 Id. 57; 62 Am. Dec. 513.

In a case where separate issues were submitted to the jury with directions to find upon each, and the verdict responded in general terms, the failure to find upon the issues as instructed

was held not to affect the verdict: *Johnson* v. *Richardson*, 52 Tex. 483.

In this case the judgment correctly interpreted the finding of the jury in favor of defendants Snyder and Spillane by discharging them with their costs.

The exception to the defendant's plea of *res adjudicata* we think was properly sustained. At a previous trial a verdict had been rendered in favor of the plaintiff against defendant Snyder, and finding appellant and defendant Spillane not guilty. Upon this verdict judgment was entered in their favor, that plaintiff take nothing by his suit, and they were discharged, with their costs. This judgment was set aside, and a new trial granted upon motion of the defendant Snyder alone. Upon this trial it was pleaded in bar of plaintiff's right to recover from appellant.

The effect of the order granting a new trial on the motion of defendant Snyder, who was with appellant and Spillane jointly and severally sued, was to vacate the former judgment, and operated as a new trial as to all of the defendants: *Long* v. *Garnett*, 45 Tex. 401; *Wootters* v. *Kauffman*, 67 Id. 488.

The court charged the jury that "where the agents of a corporate company act for and in behalf of the company, and within the scope of their powers, or are ratified by the company, and such acts are willfully and purposely done with malice, and without probable cause, the company and their said agents so acting are all each jointly and severally liable for the damages which such acts cause to the injured party."

It is contended that as the verdict is against only the appellant, and as the appellant could have only acted through its agents, its co-defendants, who were held guiltless of any wrong, that therefore the verdict is in total disregard of the law and the charge of the court.

It is claimed that the verdict is capricious, and not accounted for by the evidence, and is manifestly found without reference to the law or evidence, because all of the evidence showed that the appellant only acted in the prosecution of James, if at all, through Snyder and Spillane, its co-defendants, and that if any wrong was done, it consisted in the institution and conduct of the prosecution of appellee by Snyder and Spillane, or one of them, and not otherwise through any act of appellant, and that notwithstanding the charge that there arose a joint and several liability as between all of the defendants, yet appellant alone was found guilty.

It may be admitted, we think, that for the reason assigned the verdict is not altogether consistent, and it may be said to be contradictory. But it does not necessarily follow that this alone will be sufficient to impair or destroy the validity of a verdict. In actions growing out of that class of torts characterized by the existence of a wrongful intent as distinguished from torts arising from negligence, the rule is recognized as just which compels each of the wrong-doers, when sued, to bear and assume the responsibility of all. The injured party may sue one, any number, or all, chargeable with the tort, and it is no defense if one is sued that the others are not required to share his responsibility; nor where all are sued would it be any defense that one only is made to assume the liability for the acts of all. The reason is, that there can be no contribution as between them: Cooley on Torts, sec. 133. "While the law permits all the wrong-doers to be proceeded against jointly, it also leaves the injured party at liberty to pursue any one of them, severally, or any number less than the whole, and to enforce his remedy regardless of the participation of others": Id.

Had the verdict in this case been against all of the defendants, the liability of the appellant would not have been less than it is as the verdict now stands.

The verdict, then, not being in violation of the principles of law applicable to this class of torts, the question involved in the proposition contended for is simply whether a capricious or inconsistent verdict alone will impair its validity and of itself authorize a reversal. We think not. That it may be a significant circumstance illustrative of passion, or prejudice, or misconduct, when connected with other circumstances sufficiently strong to indicate these, is no doubt true. But alone, unsupported by anything else in the record tending to show misconduct, it has been held not to be of itself adequate cause for a reversal.

In the case of *Gulf etc. R'y Co.* v. *Gordon*, 70 Tex. 90, it is said: "That if the verdict be in one material respect the result of prejudice, passion, or other influence, not arising from a dispassionate consideration of the evidence, the inference would be strong, where it was for a large sum, that that feature of it was similarly controlled."

In the case cited, special issues were submitted to the jury directing them to respond in their findings as to whether the accident was caused by a defective road-bed, or was the result

of a defective locomotive. There was an affirmative reply to each issue thus submitted. The objection was made to the verdict in that case, as in this, that it indicated passion and prejudice, and was contradictory. The court recognized it as being inconsistent so far as it held that both were the efficient cause of the accident. But it was said "that this did not furnish a sufficient reason for a reversal, if, by looking to the entire case, it was ascertained that the verdict was uninfluenced by other improper motive." It was ascertained, in looking to the assignment in that case as to the excessive verdict, that the amount sued for, twenty-five thousand dollars actual and twenty-five thousand dollars exemplary damages for personal injuries, was assessed by the verdict. Pursuing the rule adopted in the case cited, and considering the assignment in this case complaining of the verdict being excessive, we find the amount sued for as damages caused by the alleged malicious prosecution of appellee for the offense of perjury to be fifteen thousand dollars actual and fifteen thousand dollars exemplary, and the amount found in his favor to be eight thousand dollars actual damages,—but little in excess of one half of the actual damages claimed, and under evidence to the effect that the result of the prosecution was to break the appellee up, prevented him in a measure from obtaining employment, required him to perform labor he had not previously done, and estranged from him those, or many of them, with whom he had associated in his business vocation. It will be seen, then, that in looking to the amount of damages assessed, and considering it in connection with the inconsistency of the verdict with respect to the feature of it referred to, it cannot, we think, be said that it shows that the verdict was the result of improper influences, or is contrary to law, or indicative of that misconduct which would authorize a reversal upon that ground.

It is insisted in the argument of appellant under the eighth assignment that the verdict, being confined to actual damages, demonstrates that the defendant did not act with malice or without probable cause, and that the facts fail to show a want of probable cause for the arrest of plaintiff, and rationally considered, they point to no circumstances showing the existence of malice.

The testimony is conflicting as to whether there was that want of probable cause which has been long recognized as an essential element in this action. And the jury having found

that there was no probable cause for the prosecution of James, it is unnecessary to determine whether a reasonable consideration of the facts point to the existence of malice, because the jury could infer malice if the evidence authorized them to believe that there was an absence of probable cause.

That it was believed, prior to the deposition of James and his prosecution, that a loose wheel was the cause of the wreck of appellant's passenger-coach at Kinney, in April, 1884, was a fact known to Snyder, appellant's general manager. There was evidence that, a few days after the accident (which gave rise to the Fly suit and the others pending at the time of the prosecution), a telegram was shown Snyder by Crowley, the road-master, from Newton, the train-master, containing the words "loose wheel"; that Snyder complimented Newton's brevity, and remarked: "Of course we understand it, but the world does not."

It was in evidence, also, that reports had been made of the accident, which were filed in the proper offices of the company, and which were under Snyder's control in May, 1884. When the plaintiff interviewed him, he knew about the loose wheel. Crowley had testified, in some case then pending, to the effect that the wreck was caused by a loose wheel, and Snyder had heard of this testimony, but had not seen the deposition of Crowley. From these and a number of facts testified to, the jury believed that there was no probable cause, as defined by law, for the prosecution of James for perjury, by reason of the deposition taken in the case of Fly against the appellant.

There being evidence from which the jury found there was no probable cause for the prosecution, they may have inferred malice from that fact. We do not think that because the jury having found both a want of probable cause and malice, and might therefore have assessed exemplary damages, but found only actual damages, this would afford a reason for setting aside the verdict on the ground that such a finding indicated that there was no malice. If the proof would have supported a verdict for fifteen thousand dollars actual damages, it would furnish no ground for setting aside the verdict that it found only eight thousand dollars actual damages.

The proposition under the eighteenth assignment is, that, "where there is a substantial dispute about the facts upon the issue of probable cause, the court should state the evidence, if any, which if true would establish a want of prob-

able cause, and instruct the jury, if they believe such evidence, then that there is not probable cause; and should state the evidence, if any, which if true would establish probable cause, and instruct the jury, if they believe such evidence, then that there is probable cause."

We think if this instruction had been given it would have been error. The definition contained in the charge of the court of probable cause is in accord with the authorities, and is uniformly accepted as correct. When the facts are in controversy, the question of probable cause must necessarily go to the jury, and the court should give such instructions as will enable them to draw correct conclusions from the facts as they find them: *Landa* v. *Obert*, 45 Tex. 539. This rule, stated in the case cited, is followed by the definition of probable cause, which, it was said, should have been given in that case, and which in this was given.

It is earnestly insisted that the court should have instructed the jury "that, as a matter of law, Snyder was not authorized, by reason of the fact that he was general manager of appellant, to institute or authorize the institution of the prosecution against James for the company, because, as a matter of law, it was not within the scope of a general manager's business of a railroad company to institute such proceedings; and that unless there was other evidence than the fact that he was such general manager from which the jury believed he had such authority, they would find for the defendants."

We do not think the jury should have been charged to the effect that as a matter of law that Snyder was not authorized, by reason of the fact that he had the entire control and management of the business interests of appellant, to institute or authorize the institution of the prosecution against James. Whether this was within the legitimate scope of his power as such general manager, acting for and on behalf of the company, was a question of fact to be determined by the jury. Whether a servant did the act with a view to his master's service or to serve a purpose of his own, is a question for the jury: Pierce on Railroads, 279. Nor is it any defense that the particular act by which the injury was inflicted was not authorized by the charter: Id. 280.

The general authority to do the act may be inferred from the nature of the employment and the usual course of business.

In the case cited by appellant, *Pressley* v. *M. & G. R. R. Co.*,

11 Am. & Eng. R. R. Cas. 229, the rule is there laid down, "that if an agent, while acting within the range of his employment, do an act injurious to another through negligence or intention, then for such abuse of authority conferred upon him or implied in his employment the employer is responsible," etc.

This is said to be a modification of the former less satisfactory rule, which required "the willful act to have been previously ordered or subsequently ratified." In the case cited it was held that "an agent of a railroad company, having authority as the land agent of the company to make leases, collect rents, stumpage, etc., did not have authority to institute a criminal prosecution for offenses committed with reference to the property in his custody, and bind his principal in damages for a malicious prosecution." In that case, the evidence limited the authority of the land agent to the matters of supervising or looking after the particular lands of the company, collecting the rents, etc.

In the present case, the evidence indicates that the entire business affairs and interests of the company were under the control and direction of Snyder. His testimony before the recorder's court, reproduced on this trial, was, that he had authority to conduct the prosecution. As the manager of appellant, its property, road, and facilities for transportation were used under his authority for that purpose. It was shown to be within the line of his duty to look after and protect the business interests of the company, to prepare the papers and facts in the litigation affecting its rights. Suits were then pending in different portions of the state for damages arising from the wreck of the train at Kinney, caused by a loose wheel, and it was within the scope of his powers, if he had probable cause to believe that false testimony was being given in those cases, to take the proper steps to disclose that fact, and protect the company. Had the evidence shown, to the jury's satisfaction, that such probable cause did exist, it would have been beneficial to appellant's interests in its effect upon the suits then pending.

Out of this right which the general manager had to protect the interest of appellant grows a corresponding liability for damages in the event of its exercise, as in this case, without probable cause, and in such a manner as to bring it within the definition of a malicious prosecution.

In an action for malicious prosecution against a railroad

company, where it was contended that the power of instituting a criminal proceeding was not conferred upon it by law, it was said: "Conceding that a corporation cannot be bound unless for an act done in pursuance of some object embraced by its charter or conferred by law, it is not always or necessarily outside of the objects and privileges of a railroad company to prosecute criminal offenders. It is the object of such companies to acquire and protect its property by every lawful means. It is a lawful and commendable means to protect it by the institution of criminal proceedings against those infringing such rights, etc. . . . . No law or public policy restrains them in this respect, and to hold that they cannot be held to a proper accountability would endow them with an invidious privilege": *Ricord* v. *Central Pacific R. R. Co.*, 15 Nev. 176.

Discussing, in the same connection, the character of proof requisite in such a case to show that a prosecution was instituted and conducted by its authority, it was further said: "We do not consider it necessary to produce a resolution of a board of directors." "In the absence of opposing proof," it was said that "its legal advisers, acting in conjunction with such of its agents and servants as have knowledge of the facts, will be authorized to institute the proper proceedings."

We do not think probable cause is conclusively established by proof that defendant acted under the advice of counsel. This may be considered as a circumstance showing both want of malice and as supporting the defense that there was probable cause. But we do not understand that it conclusively establishes the existence of the latter or the absence of the former: *Jacobs* v. *Crum*, 62 Tex. 411.

We have considered the assignments relied upon in the argument of appellant for a reversal, also several mentioned in the brief of appellant, and we are of opinion that the judgment should be affirmed.

VERDICT. — If a verdict stripped of all improper matter is sufficient to support a judgment under the issues made by the pleadings, it will be upheld: *Louisville etc. R'y Co.* v. *Green*, 120 Ind. 367; nor will a verdict be set aside for such informality and uncertainty as will not prevent the court from rendering the proper judgment: *Peters* v. *Bante*, 120 Id. 416; *Louisville etc. R'y Co.* v. *Lucas*, 119 Id. 583; for verdicts must be sustained, if possible, under the circumstances: *Anderson* v. *Mason City etc. R'y Co.*, 77 Iowa, 670; *Central Branch etc. R. R. Co.* v. *Andrews*, 41 Kan. 370; *Indiana etc. R'y Co.* v. *Finnell*, 116 Ind. 414; *Stern* v. *Hogan*, 120 Id. 209; *Bohr* v. *Neuenschwander*, 120 Id. 450; *Patterson* v. *Commonwealth*, 86 Ky. 313. But where a special ver-

dict fails to cover all the issues, plaintiff cannot take judgment thereon: *Reed* v. *Lammel*, 40 Minn. 397; nor will a judgment be allowed to stand rendered upon special verdicts inconsistent with each other: *Aultman etc. Co.* v. *Mickey*, 41 Kan. 348; nor upon a verdict not signed, either by the entire jury, or the foreman thereof: *Greenberg* v. *Hoff*, 80 Cal. 81. Yet a defective verdict may be amended at any time before the jury are discharged: *Pehlman* v. *State*, 115 Ind. 131; and the judge has the power to put a verdict into form so as to make it express the real finding of the jury: *Clouser* v. *Patterson*, 122 Pa. St. 372; but affidavits of jurors to explain a verdict should be received with great caution: *Alexander* v. *Humber*, 86 Ky. 565.

INSIGNIFICANT ERRORS. — The maxim, *De minimis non curat lex*, applies when a new trial is sought for mere trifling inaccuracies or insignificant errors in judicial proceedings: *Wolf* v. *Prosser*, 73 Cal. 219; *People* v. *Monteith*, 73 Id. 7; *McAllister* v. *Clement*, 75 Id. 182; *Thompson* v. *Brannan*, 76 Id. 618; *Walker* v. *State*, 50 Ark. 532; *State* v. *Gould*, 40 Kan. 258; *Township of Plymouth* v. *Graver*, 125 Pa. St. 24; 11 Am. St. Rep. 867; *Moritz* v. *Larsen*, 70 Wis. 569; *Seiler* v. *Northern Bank*, 86 Ky. 128; *Schriber* v. *Richmond*, 73 Wis. 5; *Colclough* v. *Niland*, 68 Id. 312; *Irrigation District* v. *De Lappe*, 79 Cal. 351; *Chicago etc. R'y Co.* v. *Duffin*, 126 Ill. 100; *Swamp-land etc. District* v. *Wilcox*, 75 Cal. 443.

MALICIOUS PROSECUTION. — Probable cause is primarily a question of law for the court, but where the facts tending to establish the existence of the want of probable cause are in dispute, then it becomes the duty of the court to submit the question to the jury under proper instructions: Note to *Boeger* v. *Langenberg*, 10 Am. St. Rep. 327; *Brand* v. *Hinchman*, 68 Mich. 590; 13 Am. St. Rep. 362; *Glasgow* v. *Owen*, 69 Tex. 167.

MALICIOUS PROSECUTION. — Advice of counsel is not conclusive evidence that plaintiff had probable cause in instituting the prosecution claimed to be malicious: *Glasgow* v. *Owen*, 69 Tex. 167; *Mesher* v. *Iddings*, 72 Iowa, 553; *Vann* v. *McCreary*, 77 Cal. 434.

MALICIOUS PROSECUTION — CORPORATIONS. — A corporation is liable for a malicious prosecution conducted by its agents: *Williams* v. *Planters' Ins. Co.*, 57 Miss. 759; 34 Am. Rep. 494, and particularly note 495–499; *Hussey* v. *Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312.

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[73 TEXAS, 47.]

RECEIVERS APPOINTED BY UNITED STATES COURTS ARE SUBJECT TO SUIT in any court having jurisdiction of the subject-matter, without asking leave of the court which appointed them.

RECEIVERS — JURISDICTION TO ENTER JUDGMENTS AGAINST. — No court can interfere with the custody of property held by another court through a receiver, but may establish, by its judgment, a debt against the receivership, which must be recognized by the court appointing the receiver, and is not open to revision by it, if the court rendering it had jurisdiction of the subject-matter and of the parties.

RECEIVERS — JURISDICTION TO ESTABLISH JUDGMENTS AGAINST. — The manner in which a judgment rendered against a receiver in another jurisdiction shall be paid, and the adjustment of equities between persons

having claims on the property and effects in the hands of such receiver, are under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts to conclusively establish by judgment the existence and extent of a claim.

PLEADING AND PRACTICE. — ADMISSION AND SUBSEQUENT WITHDRAWAL OF INCOMPETENT EVIDENCE will only work a reversal in cases where the evidence is of such character and the whole case so presented as to induce the belief that the jury may have been influenced by its erroneous admission.

MASTER AND SERVANT — MASTER'S LIABILITY FOR SERVANT'S WRONGFUL ACT. — When the master, by contract, express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own, and when the servant does what the master could not do, nor suffer to be done, without violation of the particular duty resting upon him, or when the servant omits to do that requisite to the full discharge of the master's incumbent duty, then the latter is responsible for the servant's wrongful or malicious act or omission; and whether the servant's act violative of the master's duty is willful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured party.

COMMON CARRIERS — DUTY TO PROTECT PASSENGERS FROM VIOLENCE AND INSULT. — It is the duty of carriers of passengers by railway, whether the latter is in the hands of the owners or of a receiver, to protect them in so far as possible, by the exercise of a high degree of care, from the violence and insults of other passengers, strangers, or the carrier's own servants; and the inquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established.

COMMON CARRIERS — DUTY TO PROTECT PASSENGERS, AND MEASURE OF DAMAGES. — A common carrier is liable to an injured passenger for actual damages, when there is a failure on its part, through its conductor, or some other representative, to give that protection to the passenger which, as a common carrier, it is bound to give; and this liability does not depend on whether the servant's failure of duty was intentional, willful, or malicious; but to make it liable for exemplary damages, the willful or malicious act of the servant must have become, in law, the act of the carrier.

COMMON CARRIERS — LIABILITY OF, FOR WILLFUL ACT OF SERVANT. — If, in performing any duty within the line of his employment, the servant of a common carrier uses unnecessary force in doing an act lawful within itself, and thereby commits a trespass or crime, such act may be deemed one for which the carrier is civilly liable; but if the act is in itself illegal, however or by whomsoever done, the carrier is not liable unless it advised or in some way participated in such act. If such act is willfully done by the servant, outside the line of his employment or duty, the malice will not be imputed to the carrier; nor is it a ratification of such act that, after knowledge of it, the servant is allowed to remain in his employment.

TORTS — RATIFICATION. — In order to constitute one a wrong-doer by ratification, the original act must have been done, or intended to be done, in his interest: otherwise, the *animus* of the wrong-doer cannot be imputed to him.

COMMON CARRIERS — RATIFICATION OF SERVANT'S MALICIOUS ACT. — Where the servant of a common carrier has committed a wrongful and malicious act in the line of his employment and duty, it cannot be held, as matter of law, that his mere retention in the same position, after knowledge of his misconduct, operates as a ratification of such act, and fixes his evil motive on the carrier. This question should be left to the jury under the evidence.

O. T. Holt, for the plaintiffs in error.

O. C. Kirven, B. H. Gardner, and Hume and Kleberg, for the defendant in error.

STAYTON, C. J. This action was brought by defendant in error, July 28, 1887, against plaintiffs in error, who were receivers appointed by a circuit court of the United States prior to the time the injury complained of was inflicted, and in possession of and operating the Houston and Texas Central Railway at the time plaintiff claims to have been injured. It was brought to recover damages, actual and exemplary, on account of injuries resulting from an assault and battery made on him while a passenger in one of the cars by the conductor in charge of the train and in the employment of the receivers.

There was a verdict and judgment in favor of defendant in error for one thousand dollars as actual and two thousand dollars as exemplary damages.

Plaintiffs in error, by plea, denied the jurisdiction of the court below, on the ground that no court other than the one appointing them could exercise jurisdiction.

This was overruled, and correctly so; for whatever may be the true rule in suits brought against receivers for necessity for leave to sue them in other courts, under the act of Congress of March 3, 1887, receivers appointed by the courts of the United States are subject to suit without leave in any court having jurisdiction over the subject-matter.

No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and is not open to revision by it if the court rendering the judgment had jurisdiction of the subject-matter and the parties.

The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver, but this does not affect the

jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim.

On the trial the conductor testified as a witness; and on being interrogated, stated that he did not tell A. W. Williams, on the night after the difficulty, holding his ticket-punch in his hand, "This is the thing I did the son of a bitch up with"; and afterwards Williams was permitted to state that the witness, at time and place mentioned, did make such a statement to him.

The evidence was objected to, on the ground that the declarations of the conductor made subsequently to the difficulty were not admissible against the defendants.

After the evidence was admitted, the court withdrew it from the consideration of the jury, and instructed them not to consider it; but it is insisted that the judgment should be reversed because of its admission.

It is frequently the case that evidence is admitted which, on reflection, the trial court deems it proper to withdraw from the consideration of the jury, and in some cases such action ought to be held to cure the error, while in other cases the evidence might be of such character, and the whole case so presented, as to induce the belief that the jury may have been influenced by the erroneous admission of evidence, although subsequently told by the court to disregard it. In the latter case, the admission of evidence that ought to have been excluded might be ground for reversal, and in the former not.

The evidence of the witness Williams was not admissible for the purpose of proving that the conductor did strike the plaintiff with his ticket-punch; but it may have been relevant to the issue as to how the battery was made; and for the purpose of impeaching the evidence of the conductor to show that he had made statements out of court different from those made in court, admissible.

If, however, the evidence was not admissible for any purpose, we do not perceive that it was calculated to operate to the injury of the defendants; for from the testimony given by the conductor on the trial, and from the testimony of McCartney and the plaintiff, there could be but little doubt that the conductor did use his ticket-punch in the battery, and the language shown to have been used by him at the time of the difficulty showed as fully his *animus* at that time as possibly could the language testified to by the witness Williams.

It is urged that the court erred in charging that defendants

would be liable if the acts of the conductor were willful and malicious.

There is no doubt that, ordinarily, the master is not liable for an injury resulting from the willful and malicious acts of his agent not done in the course of his employment. This is the rule in all cases in which the liability of the master depends on the sole fact that the person who inflicted the injury was in some business his servant; and if, upon inquiry, it be found that the act was not done while in the transaction of the master's business, then the act is not to be deemed the act of the master, for as to that the wrong-doer was not his servant.

The rule, however, cannot be applied in a case in which the master, by contract express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own. When a duty is thus imposed on the master, the servant employed to discharge it is the representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible and liable to make at least actual compensation as though the act were his own personal act.

In such cases, if the servant does what the master could not do nor suffer to be done without violation of the particular duty resting upon him, or if the servant omits to do that requisite to the full discharge of the master's incumbent duty, then the master must be held responsible for the servant's wrongful or malicious act or omission; for, otherwise, it would result that a master might relieve himself from obligation to perform a duty fixed by contract or otherwise by the employment of servants to conduct the business to which the duty attaches.

The master's obligation cannot thus be avoided, and whether the servant's act violative of the master's duty be willful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured person.

It has been steadily held to be the duty of carriers of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of other passengers and strangers, and to protect them from the violence and insults of the carrier's own servants; and the inquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that

the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established: *Ramsden* v. *Boston etc. R'y Co.*, 104 Mass. 120; 6 Am. Rep. 200; *Bryant* v. *Rich*, 106 Mass. 180; 8 Am. Rep. 311; *Croaker* v. *Chicago etc. R'y Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Stewart* v. *Brooklyn etc. R'y Co.*, 90 N. Y. 588; 43 Am. Rep. 185; *Sherley* v. *Billings*, 8 Bush, 147; 8 Am. Rep. 451; *Chicago etc. R'y Co.* v. *Flexman*, 103 Ill. 546; 42 Am. Rep. 33; *Wabash etc. R'y Co.* v. *Rector*, 104 Ill. 296; *Goddard* v. *Grand Trunk R'y Co.*, 57 Me. 202; 2 Am. Rep. 39.

Under the facts of this case, the court below properly held that the defendants, as receivers, were liable for injuries resulting from the willful or malicious acts of the conductor

On question of exemplary damages, the court instructed the jury as follows: "You are instructed that, to authorize a recovery of exemplary damages against the employer or master on account of an injury inflicted by an employee or servant, the wrongful act from which the injury resulted must be done by the servant or employee maliciously, and under such circumstances as would also authorize the recovery of actual damages from the employer or master; and further, the act must be ratified by him. If the employer or master have a knowledge of the act and its character, and still continued the employee or servant in his former position, such retention is a ratification of the act of the servant or employee."

The last paragraph of the charge quoted was repeated in a subsequent charge. In those jurisdictions in which it is held that exemplary damages may be given against a corporation for injuries willfully or maliciously inflicted by its servants in all cases in which the willful or malicious act was done in the course of the business intrusted to the servant, whether the act be authorized or ratified by the corporation, the giving of the charge complained of would probably be deemed harmless, if the acts complained of in this case can be said to have been in the line of the conductor's duties. In this state, however, that rule has not been adopted.

In *Hays* v. *Houston etc. R. R. Co.*, 46 Tex. 272, which was a case in which the act complained of might properly have been held to have been done in the course of the employment of the servant, it was said: "If the malicious act of the agent is ratified or adopted; if there is carelessness in the selection of employees or in the establishment of regulations; if, in short, the corporation or its officers by whom it is controlled are guilty

of some 'fraud, malice, gross negligence, or oppression,'—the settled rules of law will hold it liable to exemplary damages; but in our opinion not otherwise." This ruling was followed in *Galveston etc. R'y Co.* v. *Donahoe*, 56 Id. 162.

We have no disposition to reopen the question in view of the conflict in authority, and following these decisions, the remaining inquiry on this branch of the case is, Was the charge as to liability of appellants resulting from their ratification of the acts of the conductor called for by the facts of the case, or correct as a legal proposition in any case?

It appears that appellee, as a passenger, entered a car on the road controlled by appellants, and that, having stopped on the platform outside of the car, he was informed by the conductor that this was a dangerous place, and was requested to enter the car. As to whether this request was made by the conductor without insult, and in proper manner, the evidence is conflicting, as it is as to whether the conductor used force in removing appellee from the platform to the inside of the car.

Be this as it may, it does appear that blows passed between the conductor and appellee immediately after the latter entered the car; and his evidence, as well as that of the conductor, tends most strongly to show that in this rencounter appellee was the aggressor, and the conductor acting in his own defense.

They were then separated without any considerable injury to appellee; and we do not understand him to base this action on what occurred in the difficulty to which we have referred.

After that ended, the conductor went on in the discharge of his ordinary duties, and appellee took his seat among the passengers; but after a short time had elapsed, the conductor returned to the car in which appellee was, and there committed an assault and battery upon him, which, at the time, was unprovoked, and made solely to avenge the insult or wrong the conductor conceived had been done him in what he claimed was an unprovoked assault made upon him by appellee in the former difficulty.

The assault and battery there committed, and the injuries resulting therefrom, are made the basis of this action, and there is not the slightest ground for holding that it was committed in behalf of appellants, for their benefit, in their interest, or in the doing of any act necessary or proper to be done in the discharge of the duties imposed on the conductor.

On the contrary, the act complained of is shown to have been the willful and malicious act of the conductor, in violation of his duty to his employers, and to the service as well as to the passenger.

Appellants, as carriers, are liable to appellee for actual damages, because there was a failure on their part, through the conductor or some other representative, to give that protection to the passenger which they, as carriers of passengers, are bound to give; and this liability does not depend on whether the servant's failure of duty was unintentional, willful, or malicious; but to make them liable for exemplary damages, if they stand on the same ground as other carriers, the willful or malicious act of their servant must have become in law their willful or malicious act.

The rule in reference to affecting the master with the willfulness or malice of a servant must be the same, whether the master be a corporation, a receiver in charge of the business and property of a corporation, or an individual.

If, in performing any duty within the line of his employment, the servant uses unnecessary force in doing an act lawful within itself, and thereby commits a trespass or crime, then the act may be deemed one for which the master is civilly responsible; but if the act be in itself illegal, however performed or by whomsoever done, then the master ought not to be held liable, unless he advised or in some way participated in the unlawful act.

The court below charged that the act of the servant, with all of the servant's willfulness and malice, would be imputed to appellants, if, with knowledge of his misconduct, they kept him in their employment, and so without reference to whether the act was within the line of the conductor's duties, or one illegal in itself without reference to the manner of its execution.

If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor than that they had ratified his act, could their liability be fixed on that ground, however clear their subsequent approval of his act might be made to appear?

"In order to constitute one a wrong-doer by ratification, the original act must have been done in his interest, or been intended to further some purpose of his own": Cooley on Torts, 127; *Wilson* v. *Barker*, 4 Barn. & Adol. 271; *Wilson* v. *Tum-*

man, 6 Man. & G. 241; Broom's Legal Maxims, 873; Wood on Master and Servant, 598; *Bird* v. *Brown*, 4 Ex. 798; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Railway Co.* v. *Broom*, 6 Ex. 326; Moak's Underhill on Torts, 38.

In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under any pretense of authority from them, or to further any interest of themselves or the corporation whose business and property they were controlling, and there was no ground on which to base ratification, which is but an agreement express or implied by one to be bound by the act of another performed for him. If appellants could not be held to have ratified their servant's unauthorized, willful, malicious act, not done in their interest or for their benefit in fact or pretense, it is not perceived on what ground they can be held to be affected by the *animus* with which the servant committed the act; and unless they could be so affected, there is no legal ground for awarding against them exemplary damages.

If the servant's act be one not authorized by the master, or one not done in the exercise of a power fairly arising from the character of his employment, but be an act done for the use or benefit of the master, then the master may doubtless ratify the act of the servant through which a tort was committed; and it may be that in such case the ratification of the master would fix upon him the bad motive which prompted the servant's act, and thus impose on the master a liability even for exemplary damages. It has been so held by courts that hold the master not liable for exemplary damages in all cases in which the servant is: *Bass* v. *Chicago etc. R'y Co.*, 42 Wis. 654; 24 Am. Rep. 437. Such may be the effect of the decisions in this state to which we have referred, though there are contrary holdings: *Sutherland* v. *Sutherland*, 69 Ill. 481. Such a question, however, is not before us.

Relying, as appellee does, on the injury inflicted upon him by the conductor, after he took a seat in the car, we are of the opinion, under the evidence, that he shows no case entitling him to exemplary damages under the decisions heretofore made in this state, to which we have referred, and that a case is not shown in which the jury should have been charged that they might find appellants had ratified the act of the conductor.

If, however, the case were different, and it appeared that the conductor's act was done in the course of his employment, giv-

ing to this any intendment arising from his position and the nature of his duties, even then it seems to us that it cannot be held, as matter of law, that the mere retention of the conductor in the same position, after knowledge of his misconduct, operates a ratification of his willful and malicious act, and thus fixes his evil motive on his employers.

The whole doctrine of *ex post facto animus* as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought imputed, which the court below informed the jury existed, as a matter of law, if the conductor was retained in the service after knowledge of his misconduct.

There are cases which hold that retention in service under such circumstances amounts to ratification of acts that may be ratified; but it seems to us that this is not necessarily true, and that when ratification is an issue, this should be left to the jury or court trying the cause, under all the evidence, to be passed upon as any other fact in issue.

The charge given assumed that the act of the conductor was such as might be ratified, and that the facts recited in the charge, as matter of law, amounted to ratification.

We think this was error. This case does not call for it, and we are not now disposed to consider what bearing the retention of a servant in a position he has abused ought to have in determining the liability of his master for his past or subsequent acts.

It is urged that the actual damages awarded are excessive, but we think, in view of the facts, this is not true; but for reasons manifest, we decline to discuss the facts bearing on that question.

For the errors noticed, the judgment will be reversed, and the cause remanded.

RECEIVERS. — Possession of a receiver must not be disturbed, except by permission of the court: *Walling* v. *Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400, and note 403, 404, upon the subject of executions against property in the hands of receivers.

JURISDICTION AS TO SUITS BY RECEIVERS appointed in other states: Note to *Alley* v. *Caspari*, 6 Am. St. Rep. 185–189; *Humphreys* v. *Hopkins*, 81 Cal. 551; *ante*, p. 76, and note 79.

NON-REVERSIBLE ERRORS. — The admission of irrelevant or immaterial evidence which does not actually prejudice appellant will not constitute sufficient ground for a reversal: *Tienen* v. *Monahan*, 76 Cal. 131; *Chicago etc. R. R. Co.* v. *Turner*, 42 Kan. 341; *Turner* v. *White*, 77 Cal. 392; *People* v. *Collins*, 75 Id. 411; *Menk* v. *Home Ins. Co.*, 76 Id. 51; 9 Am. St. Rep. 158; *Gaver* v.

Flowers, 101 N. C. 134; *Livingston* v. *Dunlap*, 99 Id. 268; *Hanscom* v. *Drullard*, 79 Cal. 234; *State* v. *Pugsley*, 75 Iowa, 742; *Hayward* v. *Fullerton*, 75 Id. 371; *Robinson* v. *Shanks*, 118 Ind. 125; *Oshkosh etc. Co.* v. *Germania Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233; *Terre Haute etc. R. R. Co.* v. *Stockwell*, 118 Ind. 98; *Gulf etc. R'y* v. *McCorquodale*, 71 Tex. 41; *International etc. R'y Co.* v. *Moody*, 71 Id. 614; *Best* v. *Sinz*, 73 Wis. 243; *Rodney* v. *McLaughlin*, 97 Mo. 426; *Parkhurst* v. *Berdell*, 110 N. Y. 386; 61 Am. St. Rep. 384; *Bulkley* v. *Devine*, 127 Ill. 407; *Topeka* v. *Sherwood*, 39 Kan. 690; *Appeal of Dalles*, 59 Conn. 127; *Taylor* v. *Cayce*, 97 Mo. 242; *Marshall* v. *Hancock*, 80 Cal. 83; *Ullman* v. *McCormick*, 12 Col. 553; *Baker* v. *State*, 69 Wis. 32; *Kremson* v. *Purdom*, 15 Or. 589; *Travelers' Ins. Co.* v. *Harvey*, 82 Va. 950; *Chamberlin* v. *Gilman*, 10 Col. 94; *Beem* v. *Kimberly*, 72 Wis. 343; *Eslich* v. *Mason City etc. R'y Co.*, 75 Iowa, 443; *State* v. *Shoemaker*, 101 N. C. 690; *McDonald* v. *Jacobs*, 85 Ala. 64; *Chellis* v. *Coble*, 37 Kan. 558; *Rowell* v. *Hallis*, 62 N. H. 129. And where incompetent evidence is admitted without objection, and afterwards withdrawn, a reversal cannot result from the error of its admission: *Hanlon* v. *State*, 51 Ark. 186.

MASTER AND SERVANT — MASTER'S RESPONSIBILITY FOR SERVANT'S WRONGFUL ACTS: See extended note to *Ware* v. *B. & L. Canal Co.*, 35 Am. Dec. 192–201; note to *Kansas City etc. R. R. Co.* v. *Kelly*, 59 Am. Rep. 601–604; note to *Blake* v. *Ferris*, 55 Am. Dec. 317; note to *Stone* v. *Hills*, 29 Am. Rep. 640–642; *Osborne* v. *McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698, and note.

CARRIERS MUST PROTECT THEIR PASSENGERS FROM VIOLENCE AND INSULT: Note to *Ware* v. *B. & L. Canal Co.*, 35 Am. Rep. 201; *Stewart* v. *Brooklyn etc. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185; *Lynch* v. *Metropolitan R'y Co.*, 90 N. Y. 77; 43 Am. Rep. 141; note to *Chicago etc. R. R. Co.* v. *Flexman*, 42 Id. 36–38; *St. Louis etc. R'y Co.* v. *Mackie*, 71 Tex. 491; 10 Am. St. Rep. 766; but compare *Williams* v. *Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512.

MEASURE OF DAMAGES FOR WRONGFUL EXPULSION from a train is, that the passenger may recover for his time, inconvenience, expenses, and injuries to his person; and if the act of expulsion was malicious, or through gross and wanton negligence, exemplary damages may be awarded: *Southern K. R'y Co.* v. *Rice*, 38 Kan. 398; 5 Am. St. Rep. 766, and note.

RATIFICATION. — To constitute ratification, full knowledge of all the facts and circumstances attending the transaction is essential: *Vincent* v. *Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Gulick* v. *Grover*, 33 N. J. L. 463; 97 Am. Dec. 728, and note; *Billings* v. *Morrow*, 7 Cal. 171; 68 Am. Dec. 235, and note.

PRINCIPAL, TO BE PUNISHED CRIMINALLY for the acts of his agent or servant, must have directly participated in the act, or have given his assent or concurrence thereto: *Commonwealth* v. *Nichols*, 10 Met. 259; 43 Am. Dec. 432, and note.

HEFFRON *v.* POLLARD.

[73 TEXAS, 96.]

PLEADING AND PRACTICE. — WHEN A BILL OF EXCEPTIONS appears in statement of facts which has been filed during the term, it will be presumed that the whole was presented within ten days after the trial was concluded, or in other words, within the time provided by statute.

PLEADING AND PRACTICE. — WHEN STATEMENT IN BILL OF EXCEPTIONS and that in the statement of facts are not inconsistent, both should be looked to and should be taken together as constituting the bill of exceptions upon any particular matter mentioned in either.

PLEADING AND PRACTICE. — FAILURE TO STATE IN BILL OF EXCEPTIONS the ground of objection to the admission of evidence is not reason for striking out the bill, though it may have an important bearing in determining the correctness of the court's ruling in any particular case.

PRINCIPAL AND AGENT — PAROL EVIDENCE TO VARY CONTRACT. — When a written contract is made in the name of a principal, and signed in his name by another as his agent, it is not competent to show by parol evidence, in order to recover on the contract, that in signing it, the one who purported to sign it as agent signed the name of the principal for his own benefit, with intention to bind himself.

PRINCIPAL AND AGENT — PAROL EVIDENCE TO VARY CONTRACT. — If the principal is not disclosed at the time the contract is signed, parol evidence is admissible to show the agency of the signer, and to charge the principal; but if in fact the agency is disclosed when the contract is signed, then such evidence is not admissible.

PRINCIPAL AND AGENT — PAROL EVIDENCE TO VARY CONTRACT. — When the principal is undisclosed at the time of the signing of a contract, a third party suing thereon may show that there was a principal, in order to bind him, but the agent is not permitted to prove the same fact, in order to free himself from liability.

PRINCIPAL AND AGENT — PAROL EVIDENCE TO VARY CONTRACT. — An agent may show, in order to relieve himself from liability upon an apparent written contract binding him, that it was agreed, by all the parties, when it was signed, that it should not take effect as a contract, and that the real contract was an unwritten one which bound only his principal.

PRINCIPAL AND AGENT. — WHEN A PRINCIPAL, for the purpose of transacting business, adopts an assumed name, or the name of another, or of his agent, he is bound by the contract made in that name.

PLEADING AND PRACTICE. — ILLEGALITY OF CONTRACT, to be available as a defense, must be pleaded.

Howard Finley, for the appellant.

Davis and Davidson, and F. D. Minor, for the appellee.

GAINES, A. J. There was a motion submitted with this case to strike from the record certain bills of exceptions which appear in the statement of facts. A ground of the motion is, that the statement of facts appears to have been filed more than ten days after the motion for a new trial was overruled. The statute requires that bills of exceptions shall be filed during the

term (R. S., art. 1364), and it has been accordingly held that an exception which is shown by a statement of facts filed after the final adjournment cannot be considered: *Willis* v. *Donac*, 61 Tex. 588; *Lockett* v. *Schurenberg*, 60 Id. 610. On the other hand, when a bill of exceptions has been filed during term time, and the date of its presentation to the trial judge does not appear, the presumption is, that it was presented within ten days after the trial was concluded. It is not to be presumed that the judge disregarded the law, and allowed a bill of exceptions which was not presented within the time provided by the statute. We are of opinion that the same presumption should be indulged when the exceptions appear in a statement of facts which have been filed during the term. The statement of facts in this case was filed during term time, and we therefore conclude that this ground of the motion is not well taken.

A further ground is, that the ruling of the court upon the introduction of the written contract offered in evidence does not appear in the statement of facts to have been excepted to. The separate bill of exceptions does, however, show that the exception was reserved, and we think that when the statement in the bill of exceptions and that in the statement of facts are not inconsistent, both should be looked to and should be taken together as constituting the bill of exceptions upon the particular matter. The third and last ground of the motion is, that the ground of objection to the testimony is not shown. The failure to state in a bill of exceptions the grounds of objection to the admission of evidence may have an important bearing in determining the correctness of the court's ruling in any particular case, but is not a reason for striking out the bill itself.

The motion to strike out the bills of exceptions is overruled.

The appellee brought the suit in the court below. He alleged that the defendant, who is appellant here, agreed in writing to pay W. H. Pollard & Co. and one F. W. Hendricks a certain price for certain pipe, the dimension of which he described in his petition, and that he was the owner of the claim by assignment from Hendricks and his partner, who with himself constituted the firm of W. H. Pollard & Co. The substance of the allegations in the petition with reference to the execution of the agreement is, that W. H. Pollard & Co. and F. W. Hendricks "entered into a contract in writing with defendant, the said defendant so contracting in the name of John

W. Fry, by which the said Pollard & Co. and the said Hendricks bargained and sold to the said defendant a large amount of property," etc. There is an alternative allegation in the petition in which the execution of the contract is set out in substantially the same language, but which alleges a different effect as to time of delivery and payment. The defendant pleaded *non est factum*. Upon the trial the plaintiff offered in evidence a contract in writing, of which the following is a copy:—

"The County of Galveston, }
State of Texas. }

"This agreement, made and entered into by and between John W. Fry on the one part and F. W. Hendricks and W. H. Pollard & Co. on the other part. It is hereby understood that the said John W. Fry shall take all of the 24-inch pipe (concrete), not exceeding 430 lineal feet, and all of the 18-inch pipe (concrete), not exceeding 700 lineal feet, at the following prices, viz., the 24-inch pipe at $1.50 per foot, and the 18-inch pipe at $1.25 per foot. This said pipe to be paid for at the above rate, as used by the said John W. Fry, and that the said John W. Fry shall not manufacture or use any other pipe of the above-quoted sizes until all the above-noted pipe is consumed, in the city of Galveston.

[Signed] "JOHN W. FRY, per HEFFRON.
"W. H. POLLARD & Co.
"F. W. HENDRICKS.

"Witnesses:—
"N. A. OLCOTT.
"W. J. JUNKER."

In order to prove the execution of the contract so offered, plaintiff was sworn as a witness, and testified that "the written contract was signed, J. W. Fry, per Heffron, and that it was so signed by Heffron for himself and his presence,"—meaning in the presence of the plaintiff. He also testified that he had made diligent search for the subscribing witnesses, but could not find them. The defendant was then placed on the stand by plaintiff, and testified that he signed the contract "as it purported, J. W. Fry, per Heffron, but that he signed it as the agent of Fry, and not for himself, and that he had no personal interest in it." The court thereupon admitted the contract, over the objection of the defendant, and the defendant excepted.

We may treat the case, for the purposes of this opinion, as

if there was sufficient evidence introduced to show that, in executing the contract, Heffron used the name of Fry in order to make the contract for his own benefit. We think the evidence subsequently introduced, though conflicting, warranted the jury in finding that the plaintiff's theory of the case was the true one, and it may be doubted whether this would not have cured the error of introducing it for want of sufficient evidence upon that point, if error it were.

But the question presents itself, whether, in a contract like this, which is made in the name of a principal, and which is signed in his name by another as his agent, it is competent to show, by parol evidence, in order to recover on the written contract itself, that, in signing the agreement, the one who purported to sign as agent signed the name of the principal for his own benefit, and with the intention to bind himself. We have been unable to find any case in which this exact point has been determined. There are few branches of law that have given rise to more adjudications than that of principal and agent, and the cases are especially numerous in which the liability of the principal or agent as to third parties is discussed. There are certain principles, however, which are well settled. If the principal be disclosed, and it appear upon the face of the contract that the agent does not intend to bind himself, the agent is not liable. If the principal be not disclosed, it is universally conceded, as to non-negotiable contracts not under seal, that parol evidence is admissible to show the principal, and to hold him liable upon a contract made in the name of the agent for his benefit. This may seem to be an exception to the rule that parol evidence is not admissible to vary the terms of a written contract, but it is not so held. It is said not to vary the terms of the contract, but to bring in a new party, whom the law holds bound by it by reason of his relation to the party in whose name it is executed for his benefit. In such a case, the principal may either sue or be sued. But a plaintiff cannot sue both; he must make his election. If, however, the principal be disclosed, and the face of the writing shows that the agent is bound, it is presumed that the other party has elected, in the contract itself, to look to the agent, and the principal is not liable upon it.

Chandler v. *Coe*, 54 N. H. 561, was a case in which the principals were sued upon a contract which was signed by their agent, but which did not, upon its face, disclose the agency.

It was, however, a question of fact whether or not the principals were known to be such at the time the contract was executed. The court, in an able and elaborate opinion, which reviews all the authorities, hold that if the principals were not known when the agreement was signed, parol evidence was admissible to show the agency of the signer, and to charge the principal; but that if, in point of fact, agency was then disclosed, such evidence tended to vary the writing, and could not be admitted. The ground of the ruling upon the latter point was, that if the plaintiff knew when the contract was entered into that it was made for the benefit of third parties, the writing showed that they had elected to look to the agent for its performance, and parol evidence was not admissible to vary the writing by showing that they did not so elect. The contract now before us presents a different case, but we think a stronger one for the defendant. As to the legal effect of this contract, upon its face, there can be no doubt. It discloses the names and relation of all the parties connected with it. It binds Fry, the principal, and does not bind Heffron, the agent. If it had said, in express terms, that Fry was bound by the contract, and Heffron not, the meaning, in the light of the law, would not have been more unmistakable.

Can Heffron be held liable upon this written agreement? Is it permissible, in order to bind him, to show by parol testimony an intention exactly contrary to that expressed on the face of the writing, namely, that Heffron was bound by it, and that Fry was not bound? In our opinion, this cannot be done without violating a cardinal rule of evidence. It is very different from the case of an undisclosed principal. The law makes him responsible for the act of his agent. The act of the agent made for his benefit, and within the scope of the authority conferred by him, is his act. In such a case, parol evidence may be resorted to to show that by reason of a fact existing at the time the contract is made, not known to one of the parties, there is a third party, for whose benefit it is made, who is bound by it. The relation of principal and agent being unknown to one of the contracting parties, he could not make an election at that time, and it is not to be presumed that he intended to look alone to the agent, should it subsequently appear that the contract was made for the benefit of another, who has given authority for its execution. The undisclosed principal may sue on a contract made for him in

the name of his agent, and for a similar reason he is held liable to be sued. But we apprehend that if a contract in writing should expressly declare that if it should subsequently be disclosed that a party signing had a principal such principal should not be bound, no evidence would be admitted to show a liability contrary to such express terms.

But there is another point of view from which this case must be considered. The effort in the court below was to show that the defendant assumed the name of Fry in order to make the contract for his own benefit. We understand the law to be, that when a party, for the purpose of transacting business, adopts an assumed name, whether it be fictitious or the name of another, he is bound by a contract made in that name. In *Trueman* v. *Loder*, 11 Ad. & E. 589, Lord Denman says: "Parol evidence is always necessary to show that the party sued is the person making the contract, and bound by it. Whether he does so in his own name or in that of another or in a feigned name, or whether the contract be signed by his own hand or that of agent, are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop?" In that case, the principal had been engaged in doing business in the name of his agent, and the contract was signed by the agent in his own name. See also *Melledge* v. *Boston Iron Co.*, 59 Mass. 158; 51 Am. Dec. 59; *Brown* v. *Parker*, 89 Mass. 337. In the present case, also, the name is not a fictitious one. It is the name of a real person. But the contract purports to bind him alone, and upon its face is inconsistent with the idea that the defendant, in signing it, may have intended to use it for his own business name. His signature as agent clearly negatives the conclusion that any such construction was intended to be put upon it. The intention of the parties to a written contract must be derived from the writing itself, when its meaning is clear. Can it be said that the admission of parol evidence to show that the contract before us was made for the benefit of defendant and was intended to bind him does not violate this rule? We think not. The contract clearly shows the relation of all the parties to it, who was to be bound, and who was not to be bound, and its legal effect cannot be varied by such evidence.

The rule is further illustrated by the well-recognized rule that although in case of an undisclosed principal the plaintiff may show there was a principal, in order to bind him, yet the

agent is not permitted to prove the same fact, in order to free himself from responsibility. Such a contract shows clearly upon its face that he is bound, and the law will not permit him to show the contrary. To this there is an apparent, but not a real, exception. The agent may show, in order to relieve himself from liability upon an apparent written agreement, which, if real, would bind himself upon its face, that it was agreed, when it was signed, that it should not take effect as a contract, but that the real contract was an unwritten one, which bound only his principal. In other words, he may show that the writing was a mere colorable transaction, and was understood by the parties to be not a contract at all, and that the real contract was not in writing, and bound only his principal: *Rogers* v. *Hadley*, 2 Hurl. & C. 227. So in this case, we think that if it were true that the writing offered in evidence was understood and agreed to be a mere colorable transaction, intended to obscure defendant's real connection with the contract, and if he really purchased the pipe, the plaintiff could have recovered upon the real agreement notwithstanding the apparent contract entered into in writing.

If the plaintiff had alleged and proved a want of authority on the part of the defendant to make the contract for Fry, then, also, he could have maintained his action against defendant. But even in that case, according to what appears to us the better reason and the weight of authority, his action would have been, not upon the contract itself, but upon the implied warranty or for the deceit: *Bartlett* v. *Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Lander* v. *Castro*, 43 Cal. 497; *Hall* v. *Crandall*, 29 Id. 567; 89 Am. Dec. 64. The defendant testified, in effect, that he had authority from Fry to make the agreement for him. The testimony of plaintiff is not necessarily inconsistent with the idea that he did have such authority, although in signing the agreement he may have acted for himself.

If the contract had been signed in the name of Fry only, it would have been proper to have permitted it to be read to the jury, upon proof that defendant signed it; that the contract was made for his benefit, and that he assumed the name of Fry as his business name in the transaction. But the writing was inconsistent with the theory that Fry's name was used as the name of the defendant, and therefore did not establish the plaintiff's case, and should have been excluded. For the error in admitting it, the judgment must be reversed.

In order for defendant to have availed himself of the illegality of the contract as a defense, he should have pleaded it: 1 Chitty's Pl., 16 Am. ed., 506.

If the plaintiff could have maintained his action upon the written contract, four years not having elapsed when the suit was brought, the statute of limitations was no defense.

The other questions we deem unnecessary to consider.

The judgment is reversed, and the cause remanded.

Presumptions will be Indulged in by the appellate court to favor the regularity of the proceedings in the trial court: *Buchanan* v. *Mallalieu*, 25 Neb. 201; *State* v. *Braniff*, 76 Iowa, 291; *Burnheim* v. *Brogan*, 66 Miss. 184; *Blodgett* v. *Schaffer*, 94 Mo. 652; *Manning* v. *Bresnahan*, 63 Mich. 584; *Stone* v. *Brown*, 116 Ind. 79; *McCray* v. *Humes*, 116 Id. 103; *In re Sharp*, 78 Cal. 483; *Campbell* v. *Walls*, 77 Id. 250; *Harris* v. *Frank*, 81 Id. 281; *Latham* v. *Schall*, 25 Neb. 535; *Price* v. *Buchanan*, 12 Col. 366; *Behymier* v. *Nordlop*, 12 Id. 352; *Gilpin* v. *Gilpin*, 12 Id. 504; *Kilbourn* v. *Anderson*, 77 Iowa, 501; *Lawrenceburg F. Co.* v. *Hinke*, 119 Ind. 47; *West Lumber Co.* v. *Newkirk*, 80 Cal. 275.

Parol Testimony with Reference to Contracts in Writing Generally: See note to *Palmer* v. *Farrell*, *ante*, p. 708.

Parol Testimony to Vary Contracts in Writing executed by an agent: Note to *Tarver* v. *Garlington*, 13 Am. St. Rep. 631, 632; *Bulwinkle* v. *Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645, and note; *Tannatt* v. *Rocky Mountain Nat'l Bank*, 1 Col. 278; 9 Am. Rep. 156, and note.

Missouri Pacific Railway Company *v.* Platzer.

[73 Texas, 117.]

Judgment not Reviewed when Evidence Conflicting.— Where, in an action against a railroad company for damages for the negligent escape of fire from its engine, the evidence is conflicting, whether, if such engine was furnished with the most approved appliances to prevent the escape of fire and was carefully operated by skillful and experienced men the fire could have escaped in the manner testified to, and judgment for damages is rendered, it will not be revised on the ground that it is not supported by the evidence.

Railroads — Liability for Fire. — Where a fire has its origin from sparks negligently allowed to escape from a railroad company's engine, it is liable in damages, no matter how strenuous efforts may have been afterwards made by the company's servants to extinguish the fire.

Railroads — Duty to Prevent and Liability for Fires. — Railroad companies are not only required to exercise a high degree of care to prevent the kindling of fires by escaping sparks from their locomotives, but are also under obligation to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care.

RAILROADS — DUTY TO EXTINGUISH FIRES. — Where a fire has been kindled by escaping sparks from a railroad company's locomotive, when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, the company is still under duty to use ordinary care to extinguish the fire, no matter whether it arose on the company's right of way or on contiguous lands; and failure to exercise such care as the circumstances of the case indicates to a prudent man as proper gives a cause of action for injury resulting. In such case, the question of due diligence in extinguishing the fire is for the jury.

PLEADING AND PRACTICE — INSTRUCTIONS. — A charge should not be given when there is not sufficient evidence to fairly raise an issue of fact to which it relates, because to give it induces the jury to believe that, in the opinion of the court, there is such evidence.

Willie, Mott, and Ballinger, for the appellant.

A. B. Buetell and F. Charles Hume, for the appellees.

STAYTON, C. J. This action was prosecuted by appellees to recover the value of grass and other property charged to have been destroyed by a fire which, it is alleged, was caused by sparks and fire negligently permitted to escape from one of appellant's locomotives.

It is further alleged that the servants of appellant negligently failed to extinguish the fire when it originated, although they might have done so by the exercise of slight diligence.

The cause was tried before a jury, and resulted in a verdict for appellees, on which a judgment was entered.

Appellee's land seems to have been situated at a considerable distance from the railway.

The great weight of the testimony tends to show that the locomotive from which it is claimed fire escaped was furnished with the most approved appliances to prevent the escape of fire, and that it was carefully operated by an experienced and skillful engineer and fireman, but there was testimony tending to show that fire could not have escaped, as witnesses testified it did, had the appliances to avoid its escape been such as appellants contends they were.

The judgment, therefore, cannot be revised on the ground that it is not supported by evidence.

The court below more than once instructed the jury that appellees were not entitled to recover unless the fire had its origin in the negligence of appellant or its servants.

Two of the charges given were as follows:—

"Railroads are authorized and allowed by law to run trains upon their tracks propelled by steam generated by fire, and they are authorized to use all reasonable means which will per-

mit them to carry out the purposes for which they were created. They are permitted to use fire in their furnaces, and are not to be restricted in their operation or held to liability because sparks of fire may be emitted from their engines. They are required to keep their engines in good order, and skillfully and carefully handled, and to use and keep in good order such appliances as the experience of practical railroad men determine are among the best to prevent the escape of sparks and fire, and to prevent the accumulation of combustible material on their right of way. And they are not required to do any more. If no appliances are invented which will prevent the escape of sparks and fire, and at the same time allow sufficient steam to be generated to properly propel their trains, then they are only required to use such appliances as are considered among the best by railroad experts.

"If the jury believe, from the evidence, that the engine at the time of the fire was in good order, and skillfully handled by competent employees, and that it was supplied with appliances that are considered among the best by practical railroad men to prevent the escape of sparks and fire, and that said appliances were in good order, and that the servants and employees of defendant in charge of the train did not negligently permit the escape of sparks or fire therefrom, and that there was no accumulation of combustible material on the right of way in which the fire could start, they will find for the defendant, even though they may believe that the fire was caused by sparks from the locomotive."

The court, however, gave the following charge: "If you believe, from the evidence, that fire from defendant's engines or appliances caused the burning of plaintiff's and intervenor's property, and that the employees of defendant saw the fire after its starting, and if you believe, from the evidence, that they could have extinguished it by diligence, and if you believe that they were guilty of negligence in not extinguishing it, then such negligence of the employees would be imputed to the defendant company, and make it liable for damages."

It is contended that it was error to give this charge, and the proposition is made that "the company was not liable because of any negligence on the part of its employees in extinguishing the fire or in failing to do so, unless it was an undisputed fact that the fire was started through negligence on the part of the defendant company."

If the fire had its origin in the negligence of appellant, it

would be liable, whether its servants made effort, however strenuous, afterwards to extinguish it.

There is some conflict of authority as to whether it is negligence in a railway company to omit the extinguishment of a fire having its origin in the careful prosecution of its business.

In *Kenney* v. *Hannibal & St. J. R. R. Co.*, 63 Mo. 99, it was held that if a railway company's servant saw a fire, and by the exercise of reasonable care might have extinguished it, their failure to do so would render the company liable, notwithstanding the fire had its origin in the careful management of the business of the company.

The same case again coming before that court, the former decision was pronounced *obiter*, and a different rule established: 70 Mo. 256.

In disposing of the question, the court said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty as citizens to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indifference to the destruction of a neighbor's property, but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. . . . . If not liable for the origin of the fire, he [the master] cannot be held so on account of the neglect of a social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society."

It may be that the inquiry in such a case is, not what was within the line of the servant's employment, but what was within the line of the master's duty, and what was it under obligation to make within the line of the servant's employment.

To assume that a railway company is not liable for the origin of a fire caused by sparks from a locomotive having the most approved appliances to prevent the escape of fire, controlled by most careful and competent men, and on a right of way free from combustible material, is to assume, as matter of law, that negligence cannot co-exist with these things; that a railway company that has in so far used due care has discharged its whole duty, and is under no further obligation to do more for the protection of property along its line, or near to it, from fire that may escape from its engines, although this might be done by the exercise of but little more care.

The court of appeals of Maryland seems to have held that the exercise of the care specified in the two charges first-above quoted would absolutely relieve a railway company from liability for an injury resulting from the escape of fire from an engine, and that no obligation whatever rested upon a railway company to extinguish a fire caused by the escape of sparks from a locomotive operated under such conditions: *Baltimore etc. R. R. Co.* v. *Shipley*, 39 Md. 254.

The cases to which we have referred were probably cases in which the owners of the land on which the fires occurred had been compensated for the right of way through condemnation proceedings, or otherwise, into which had entered the item of increased risk of fire from the construction and operation of the railroad in a careful manner. In some of the states, this item of increased risk is taken into consideration in ascertaining the damages in condemnation proceedings, and this has sometimes been given as a reason why the exercise of the care stated in the two charges before referred to should relieve a railway company from further duty to provide against injuries resulting from fires caused in the conduct of their business.

It would seem even in such cases, in the absence of some settled rule of law prescribing the specific acts of care incumbent on a railway company, and with reference to which condemnation or other proceeding to acquire right of way may be presumed to have been conducted, that the true rule would be, that a railway company would be liable for an injury from fire resulting from the failure of the company to use due care under the circumstances of a given case; for while "the company has paid for its right of way and for all the inconveniences which are likely to result from the construction and use of its road, this does not cover all sorts of damages, ... and it cannot cover damages arising from negligence, for the law never anticipates this in assessing damages, and it never allows people to purchase a general indemnity for carelessness": *Huyett* v. *Philadelphia etc. R. R. Co.*, 23 Pa. St. 374.

In some of the states, it is held to be the duty of a railway to extinguish a fire having its origin in the conduct of the company's business, if this can be done by the exercise of ordinary care, and the inquiry as to whether this duty arises in all cases, or only in cases in which the fire originated through the company's negligence, seems not to have been deemed important: *Rolke* v. *Chicago etc. R'y Co.*, 26 Wis. 538; *Erd* v.

Chicago etc. R'y Co., 41 Id. 66; *Bass* v. *Chicago etc. R'y Co.*, 28 Ill. 1; 81 Am. Dec. 254.

If the injury from fire escaping from a locomotive be unavoidable, the business of operating them being lawful, no damages can be recovered for a loss thus occurring, unless this general rule be controlled by some constitutional provision; but if the fire have its origin in the negligence of the company, or without negligence, but in the conduct of its business, then we do not see that it would not be the duty of the company in the one case as much as in the other to use proper care to prevent injury to others.

The rule that a railway company owes no duty looking to the safety of property of persons situated on or near to its line other than to use a high degree of care to prevent the kindling of fires through the escape of fire from their engines, seems to us a narrow rule.

The business is conducted for the benefit of the company, and is of great advantage to the public; but there is no hardship in requiring them not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care.

Every person has the right to kindle a fire on his own land for any lawful purpose, and if he uses reasonable care to prevent its spreading and doing injury to the property of others, no just cause of complaint can arise; yet, although "the time may be suitable and the manner prudent, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches, and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant: *Bachelder* v. *Keagan*, 18 Me. 38; *Barnard* v. *Poor*, 21 Pick. 380; *Tourtellot* v. *Rosebrook*, 11 Met. 462"; *Hewey* v. *Nourse*, 54 Me. 259; *Higgins* v. *Dewey*, 107 Mass. 494; 9 Am. Rep. 63.

If one who had kindled a fire on his own land should see it spreading under the influence of a strong and unexpected wind without which it would not have spread, should then use every possible effort to extinguish it before it reached the line of his own land, but be unable to do so, could he then cease

his efforts, and be heard to say that he had discharged the entire duty cast upon him by law and the clearest principles of right, and was not liable for the destruction of his neighbor's house or barn by the fire of his own kindling if it appeared that by ordinary diligence he could have arrested the fire soon after it crossed his own line, and before it seriously injured his neighbor? We think not; for having put in motion the destructive element, nothing short of the exercise of due care to prevent injury from it ought to relieve him from responsibility. He could not be heard to say that the limit of his obligation was fixed by and as narrow as the boundaries of his land.

A failure under such circumstances to follow the fire across the line between him and his neighbor, and to extinguish it whenever he could, could not be said to be only the neglect of a social duty.

If this be true as to an individual who in the exercise of the highest care has kindled a fire on his own land for a lawful purpose, and who has no suspicion that thereby his neighbor's property is imperiled, what must be the rule with a railway company claiming, as all do, that the business it is conducting is necessarily, when conducted with the utmost care, attended with danger to property along its line?

The very groundwork on which the two charges given by the court, and together before quoted, stand, is, that, to conduct the business of such companies successfully, they must use fire in engines, from which, with the use of the highest care, fire will sometimes escape, and property through this be destroyed.

The cases show that it is not important whether the origin of a fire be in negligence, and that liability exists on the ground that the failure to use proper care to prevent the spread of fire lawfully kindled is negligence as clearly as is an originally unlawful kindling from which injury to another results.

The kindling of a fire by the escape of sparks or coals from an engine when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, whether the fire arise on the company's right of way or on contiguous lands, cannot be more lawful, or the obligation to extinguish less, than is it when done by an individual on his own land; and it cannot be said, without doing violence to reason and right, that as high an obligation does not rest on a

railway company to extinguish a fire, when kindled under such circumstances, as rests on the owner of land when fire lawfully kindled by him spreads.

The kindling in the one case is absolutely lawful, while in the other it is lawful by permission, if due care be used to control it, on the theory that engines on railways cannot be operated successfully without some danger of scattering fire.

Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engines, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give cause of action for an injury resulting.

Some of the courts to whose decisions we have referred have held that specific acts of diligence were or were not required, but we are of the opinion that whether due diligence has been used in a given case is a question of fact to be passed upon by the court or jury trying a cause, when there is evidence on which such an issue fairly arises.

We are of opinion, however, looking to the evidence, that the charge would have authorized a verdict in favor of appellees for the failure of appellants' servants to do what, under the evidence, there is no reason to believe they could have done.

The charge was evidently drawn with reference to the position of employees of appellant to the fire at the time it commenced, and not with reference to the general duty of appellant; and the appellee, with a knowledge of their position and of the surroundings which tended to spread the fire rapidly, which he obtained from the other testimony, was evidently of opinion that the employees could not have arrested the spread of the fire, and such was the general tenor of the testimony.

A charge should not be given when there is not sufficient evidence fairly to raise an issue of fact to which it relates; for the giving of a charge under such circumstances induces a jury to believe that in the opinion of the court there is such evidence.

It may be that the finding of the jury would have been the same had the charge complained of not been given; but this we cannot know, and because the court gave it, the judgment will be reversed, and the cause remanded.

In *Missouri Pacific R'y Co.* v. *Donaldson*, 73 Tex. 124, the action was based upon the same grounds, and the facts involved were the same as in the principal case. The company relied upon the defense that it used the most approved appliances to prevent fires, and employed the most skillful servants. At the trial, a witness, after testifying to these facts, stated, over the objection of the company, that there was a fire at a place named Dickinson on or about the same day, and that fires at or near that place were of frequent occurrence. The witness then testified that the fire at Dickinson had its origin in sparks escaping from one of the company's locomotives, though not from the one from which it was claimed the fire in question originated. The court holds that this evidence, in so far as it had a tendency to rebut the defense set up by the company, was admissible, but such of the evidence as referred to fires generally, not shown to have started soon after the company's engines passed, or to have resulted from the escape of fire from such engines, was irrelevant, and should have been excluded. The evidence was clear that the fire in question had its origin in sparks escaping from a certain engine on the company's road, but was conflicting as to whether this engine was equipped with complete and perfect appliances to prevent the escape of fire, with competent and careful men, and whether the roadway was free from combustible matter; and the court held that the issue of negligence in the company in causing the fire should have been submitted to the jury. The evidence on the question whether the employees of the company could have extinguished the fire was, that two of its section-hands were at work on the line of the road about half a mile from the place where the fire began; that it spread rapidly, was in high grass, and that the company was unable to extinguish it; that the section-foreman was one of the men nearest the fire when it started, and that he tried to extinguish it; that the road-master was passing on a train when he discovered the fire, and gave orders to the section-foreman to extinguish it, if possible. On this evidence, the following charges given by the court were complained of:—

"If you believe, from the evidence, that the defendant company's engine or appliances set fire to the grass, and was thus communicated to and destroyed plaintiff's property, and that the employees of defendant were guilty of negligence in not extinguishing the fire, then the plaintiff would be entitled to recover his damages from the defendant company.

"In determining whether or not the employees of defendant were guilty of negligence in not extinguishing the fire, you must look to all the facts and circumstances to determine whether or not they were guilty of negligence in not extinguishing the fire, and whether they could have extinguished the fire but for their negligence.

"Negligence on part of the employees of defendant who were not on the trains is the absence of such care and prudence as persons of ordinary care would have observed under similar circumstances."

In passing upon the correctness of these charges the court said:—

"It will be observed that these charges do not relate to the general duty of a railway company to extinguish a fire originating from sparks or coals escaped from an engine, and to its liability for the failure to use due care in this respect, but to the liability of the company on account of the failure of some of its servants to extinguish the fire, if they could have done so by the exercise of that degree of care persons of ordinary prudence would have observed under like circumstances.

"The first and second paragraphs of the charge complained of were correct, and the third, in so far as it defined negligence of appellant's servants

not on trains, was correct, and if applied to those on trains would not have been erroneous, their duties to the public being always considered; but as to the last the charge was silent.

"The court probably intended to exclude the idea that appellant would be liable for the failure of its servants engaged in operating trains to extinguish the fire, and if the charge was so understood, appellant has no ground to complain of the form of the charge; but we are of the opinion that the evidence did not justify a charge which permitted the jury to find that appellant was guilty of negligence in that its servants not on trains did not extinguish the fire."

On the question of the duty of a railroad company to extinguish fires, lawfully kindled by escaping sparks from its locomotives, without negligence, and its liability for failure to use reasonable and ordinary care in so doing, the principal case was followed and approved; but for the reasons given, the judgment in the case, which was for plaintiff below, was reversed.

REVIEW OF EVIDENCE BY THE APPELLATE COURT. — The general rule is, that the appellate court will not review the findings of the jury, or of the court acting as a jury, when such findings are based upon conflicting evidence: *Peacock* v. *Boyle*, 41 Kan. 492; *Gray* v. *Winder*, 77 Cal. 525; *Bernheim* v. *Christal*, 76 Id. 567; *Iron Mt. Bank* v. *Armstrong*, 92 Mo. 265; *Western etc. R. R.* v. *Mathis*, 77 Ga. 488; *Paden* v. *Bellman*, 87 Ala. 575; *Helbron* v. *Graves*, 78 Cal. 380; *Comptoir D'Escompte de Paris* v. *Dresbach*, 78 Id. 15; *Rapid T. R'y Co.* v. *Fox*, 41 Kan. 715; *Dayton* v. *Dayton*, 68 Mich. 437; *Ullman* v. *McCormick*, 12 Cal. 503; *Park Co.* v. *Jefferson Co.*, 12 Col. 585; *Harvey* v. *Guiraud*, 12 Id. 588; *Luthe* v. *Luthe*, 12 Id. 429; *Sylvester* v. *Blancy*, 12 Id. 206; *Mahan* v. *Wood*, 79 Cal. 258; *Wolf* v. *Brass*, 72 Tex. 133; *Dalhoff* v. *Bennett*, 77 Iowa, 140; *Angel* v. *Bilby*, 25 Neb. 595; *Barnum* v. *Bridges*, 81 Cal. 604; *Harris* v. *Frank*, 81 Id. 280; *Railway* v. *Combs*, 51 Ark. 324; for the weight of evidence is not for the appellate court to determine: *Joseph* v. *Kronenberger*, 120 Ind. 495; *Hamilton* v. *Hawley*, 120 Id. 502; *Rund* v. *Sprague*, 117 Id. 456; *Atchison etc. R. R. Co.* v. *Schneider*, 127 Ill. 145; *Durrell* v. *Hart*, 25 Neb. 610; *Stephenson* v. *Ravenscroft*, 25 Id. 678; and if there is any evidence to sustain the findings of the lower court, they will not be disturbed on appeal: *In re Rose*, 80 Cal. 167. In California, on an appeal from a judgment not taken within sixty days after the rendition thereof, there can be no review of the evidence: *McGrath* v. *Hyde*, 81 Id. 38; *Greenwood* v. *Adams*, 80 Id. 75; *Turner* v. *Reynolds*, 81 Id. 214; and never can the evidence in a civil case be reviewed on appeal where there is no specification in the transcript raising the question: *Belcher* v. *Murphy*, 81 Id. 40. But in the absence of any evidence to sustain a verdict, a judgment rendered thereon should be reversed: *Woodruff* v. *White*, 25 Neb. 745; so where the verdict is beyond question against the evidence, a new trial should be granted: *Roberts* v. *Crowley*, 81 Ga. 429; *Miller* v. *White*, 23 Fla. 301; *Hoult* v. *Baldwin*, 78 Cal. 410.

RAILROADS — LIABILITY FOR FIRE: See *Metzgar* v. *Chicago etc. R'y Co.*, 76 Iowa, 387; 14 Am. St. Rep. 224, and note; *Laird* v. *Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564, and note; *Union Pac. R'y Co.* v. *De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Gulf etc. R'y Co.* v. *Benson*, 69 Tex. 407; 5 Am. St. Rep. 74, and note; extended note to *Burroughs* v. *Housatonic R. R. Co.*, 38 Am. Dec. 70-79.

PRACTICE — INSTRUCTIONS. — It is proper for the court to refuse instructions, though abstractly correct, which do not apply to any theory of the case as established by the evidence: *Stumore* v. *Shaw*, 68 Md. 11; 6 Am. St.

Rep. 412; *Evansville etc. R. R. Co.* v. *Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458; *Titley* v. *Enterprise etc. Co.*, 127 Ill. 458; *Kinsley* v. *Morse*, 40 Kan. 577; *Miner* v. *Vedder*, 66 Mich. 101; *In re Briswalter*, 72 Cal. 107; *State* v. *Slingerland*, 19 Nev. 135; *Niantic Coal Co.* v. *Leonard*, 126 Ill. 216; *Merchants' etc. Co.* v. *Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847; *Besso* v. *Southworth*, 71 Tex. 765; 10 Am. St. Rep. 814; *People* v. *Lung Yun Gum*, 77 Cal. 636; *Furr* v. *Eddleman*, 80 Ga. 661; cases collected in note to *Farish* v. *Reigle*, 62 Am. Dec. 688.

GALVESTON, HARRISBURG, AND SAN ANTONIO RAILWAY COMPANY *v.* GARRETT.

[73 TEXAS, 262.]

MASTER AND SERVANT — DUTY TO FURNISH SAFE MACHINERY. — Though a railway company need not furnish its employee with the best and most improved machinery, still it must use reasonable care in furnishing him with such as is reasonably safe, suitable, and adapted to the work to be performed. If the company, by negligence, fails to furnish such machinery and appliances, by reason of which the employee, in the discharge of his duty, ignorant of defects therein, and not chargeable with notice, actual or constructive, thereof, and exercising ordinary care, is injured, the company is liable in damages.

MASTER AND SERVANT — DUTY TO WARN EMPLOYEE OF DEFECTIVE MACHINERY. — When a railway employee does not know of a defect in machinery furnished him by the company, and could not have ascertained it by the use of ordinary care, while the company does know of it, or is, under the circumstances, chargeable with such knowledge, it is bound to warn the employee, or respond in damages if he is injured.

MASTER AND SERVANT — DUTY TO WARN EMPLOYEE OF DEFECTIVE MACHINERY OR UNUSUAL RISK. — A railway employee has a right to assume that the machinery furnished him by the company is safe, suitable, and adapted to the service in which it and he are employed. He assumes only the risks ordinarily incident to his employment, and such as he knows to exist, or may know by the exercise of ordinary care; and if a defect in the machinery or an uncommon risk exists, known to the company, but not known to him by the exercise of ordinary care, and of which he is not warned, the company must respond in damages, in case of injury to him through such defect or risk.

APPEAL from a judgment for three thousand five hundred dollars in favor of the appellee, as damages for personal injuries, in having three fingers crushed, while in the employ of the appellant, under the circumstances detailed in the opinion.

W. N. Shaw, for the appellant.

Goldthwaite and Ewing, for the appellee.

COLLARD, J. There is an implied contract on the part of a railway company to furnish its employees reasonably safe and

suitable machinery,—not the best and most improved, but such as is reasonably safe and adapted to the work to be performed. It is bound to ordinary care in this respect: Beach on Contributory Negligence, secs. 124, 125.

If the company by negligence fail to furnish such machinery and appliances, by reason of which its employee, in the discharge of his duty, ignorant of the defect, and not chargeable with constructive notice of it, and at the time exercising due care, is injured, the company would be liable. If the employee does not know of the defect, and could not have ascertained it by ordinary care, and the company does know of it, or is, under the circumstances, chargeable with such knowledge, it is required to warn the servant: Authorities at close of the opinion. The law is the same where there is any superadded risk not usual to the employment.

The plaintiff was a brakeman on freight trains of defendant, had been so six or seven months, when he was injured while coupling a box-car to a locomotive. He engaged to serve as a brakeman on a freight train. The locomotive in use at the time was intended for a passenger train, having a coupling apparatus with an attachment commonly called a "goose-neck," which, when used on freight trains, was a useless attachment, and, according to plaintiff's evidence, was very dangerous to the employee in the act of coupling. Defendant had several of these locomotives equipped with this attachment on the division of the road where plaintiff was employed, and some without it, provided with the ordinary coupling apparatus used on freight-train locomotives,—some of defendant's witnesses testifying to as many as five, others to only three, and plaintiff's witnesses not more than two, with the "goose-neck" appliance in operation at one time on the division. And it may be fairly deduced from evidence offered by plaintiff that these appliances were broken off or taken off of all these engines but one, the one causing the accident, before plaintiff was hurt. Plaintiff himself swore that he had never before seen one of these appliances on defendant's freight-train locomotives, was not informed and did not know they were in use, and while he was in the service had always worked with the ordinary locomotive furnished with the simple draw-head coupling apparatus. It was in proof that the coupling with the "goose-neck" appliance is not made in the same way it is without it.

Plaintiff testified that he had been working with the usual

engine, and that this particular engine was sent out of the round-house without warning, and he, not knowing or expecting it had the "goose-neck" attachment, undertook to couple it to a box-car in the usual way, and so got hurt as alleged. The engineer in charge of the locomotive and the fireman both swore they warned him about the "goose-neck," and the engineer swore that he moved the engine back within six inches of the box-car, and then got off of the engine, and went around and showed him how to make the coupling. The conductor also testified to certain expressions of plaintiff immediately after he was hurt, tending to show that he was not looking and attending to his business, or exercising any care at the time he was hurt. Plaintiff, in his testimony, denies the statements of the fireman, engineer, and conductor. The jury, as was their privilege, believed the testimony of plaintiff. Under the evidence adduced by plaintiff, we cannot say the verdict of the jury is so clearly wrong as to authorize us to set it aside. There is evidence tending to show that defendant was negligent in using the McQueen engines in its train service, and in doing so, without warning plaintiff of the increased hazard of his employment, it violated its implied obligation to him. He was warranted in acting under the assumption that the machinery was safe, and was adapted to the service in which it and he were employed. He had the right to expect that the machinery was safe and suitable. He assumed the risks ordinarily incident to such employment, and such other only as he knew existed, or might have known by ordinary care: *Galveston etc. R'y Co.* v. *Drew*, 59 Tex. 10; 46 Am. Rep. 261.

Plaintiff's evidence shows that there was unusual risk not common in such employment; that he was not warned of it, did not know it, and that he had been working the whole time of his employment with the ordinary train-engine; from which the jury may have concluded that he was not chargeable with knowledge of the defect for the want of the exercise of ordinary care; it was also clear that defendant did know of the dangerous character of these engines. All these questions were submitted to the jury by clear and appropriate charges; the law of the case and the verdict was for plaintiff, and we do not think it ought to be set aside.

There were more witnesses against than for plaintiff's case, on the vital point of his knowledge of the defect in the coupling apparatus, and there was a serious conflict in the evidence

as to plaintiff's opportunities and means of information, by which it was attempted to show, on defendant's side, that plaintiff had constructive notice of the condition of the engine; that he ought to have known it, and could have done so by the exercise of reasonable care; but the jury solved all these conflicts in favor of plaintiff, accepting his testimony, and rejecting that of defendant.

The law of the case was correctly given in the charge of the court, and we are of opinion the judgment of the court below should be affirmed. See *Missouri Pac. R'y Co.* v. *Somers*, 71 Tex. 700; *Missouri Pac. R'y Co.* v. *Callbreath*, 66 Id. 526; *Houston etc. R'y* v. *Fowler*, 56 Id. 452; *I. & G. N. R'y Co.* v. *Hester*, 64 Id. 401; Shearman and Redfield on Negligence, secs. 92–97; Beach on Contributory Negligence, secs. 135–137 et seq., including 140.

MASTER AND SERVANT. — It is the duty of a master to furnish safe machinery and appliances for his servants: *Southern K. R'y Co.* v. *Croker*, 41 Kan. 747; 13 Am. St. Rep. 320, and note; *Griffin* v. *Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526; but he is not required to furnish the safest and best machinery and appliances that can possibly be obtained: Note to *Buzzell* v. *Laconia Mfg. Co.*, 77 Am. Dec. 222; note to *Sweeney* v. *Berlin etc. Co.*, 54 Am. Rep. 726 et seq.; *Lehigh Coal Co.* v. *Hayes*, 128 Pa. St. 294; *ante p.* 680, and note. Compare note to *Rogers* v. *Ludlow Mfg. Co.*, 59 Am. Rep. 75–79.

MASTER AND SERVANT. — As to what risks are ordinarily assumed by a servant, see *Magee* v. *North P. C. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69, and particularly cases cited in note 75.

MASTER AND SERVANT. — A servant has the right to assume that all things furnished him by his master are fit for the use he is directed to make of them: *Magee* v. *North P. C. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69. And a servant does not assume peril from dangerous machines, unless he knows the danger, or by ordinary observation ought to know it: *Scanlon* v. *Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733, and note.

MASTER AND SERVANT. — Master must inform his servant as to any increased danger or hazard created by him in a change of machinery or premises: *Louisville etc. R'y Co.* v. *Wright*, 115 Ind. 378; 7 Am. St. Rep. 432.

Missouri Pacific R'y Co. v. Foreman.

[73 Texas, 311.]

Common Carriers — Duty as to Passengers at Intermediate Stations. — Where a railroad company contracts with a passenger to carry him to his point of destination, he is not expected to leave the cars at intermediate stations, and the company does not engage to afford him opportunity to do so, except at the usual places for refreshments.

Common Carriers — Duty to Through-passengers at Way-stations. — A through-passenger has no right to leave the cars at a way-station where refreshments are not served, and if he asks the conductor how long the train will stop at such station, the latter is not presumed to know that it is the desire of the inquirer to alight and consume the time of the stop on business away from the cars; and, in such case, the answer given by the conductor neither increases nor diminishes the duty or liability of the company to the passenger. If injury results from reliance upon the answer made by the conductor, the passenger cannot recover.

Negligence is not Presumed against Plaintiff; but when his own evidence tends to create such presumption, he must rebut it by sufficient proof to produce belief in the minds of the jury that negligence on his part did not in fact exist.

Baker, Botts, and Baker, for the appellant.

Abercrombie and Randolph, for the appellee.

Gaines, A. J. The appellee brought this suit against appellant to recover damages for a personal injury. The case made by his own testimony was, that he purchased a ticket and took passage from Trinity Station to Conroe on a train upon a railroad then operated by the appellant company; that just as the arrival at Dodge, an intermediate station, was announced, he asked the conductor how long the train would stop at that station, and was answered that it would stop five minutes. Upon the arrival at that station he left the cars to inquire for a letter, and he had gone but a few steps when he saw the postmaster and called him and made the inquiry, and received the answer that there was none for him. About that time he heard the train start, and ran to get aboard. He reached it about midway of the rear coach, and as it passed he seized the hand-rail of the rear end of the car, and thereupon the train seemed to give a jerk, and threw him upon the track, and injured him. The conductor of the train testified that he did not tell plaintiff that the train would stop five minutes at the station, and that he knew nothing of his leaving the train. The engineer testified, also, that he had no knowledge of the latter fact.

The court charged the jury, in effect, that if the conductor

told the plaintiff that the train would stop five minutes at Dodge, and then moved the train before the time had elapsed, this was negligence on part of the company, and refused an instruction asked by the defendant to the effect that the jury, in arriving at their verdict, should not take into consideration any testimony tending to show that plaintiff asked the conductor how long the train would stop at Dodge, or the conductor's reply that it would stop five minutes. The giving of the former and the refusal of the latter charge are complained of in separate assignments of error. If the plaintiff had made known to the conductor his desire to stop at the station, and the conductor had expressly or impliedly promised him to wait five minutes, or if the conductor, upon his asking the question, told him that the train would stop a designated time, and the conductor subsequently knew that he had left the train and moved it without giving him time to re-enter the car, the plaintiff would have had a different case,—one, however, which we do not feel called upon to determine on this appeal, and upon which we express no opinion.

The contract of a railroad company with a passenger is to carry him to his point of destination. He is not expected to leave the cars at intermediate stations, and the carrier does not engage to afford him an opportunity to do so except at the usual stopping-places for refreshments.

It follows, we think, that when a conductor is merely asked how long a train will stop at a certain station, he is not presumed to know that it is the desire of the inquirer to alight and to consume the time of the halt on business away from the cars. Such questions are frequently asked by passengers from idle curiosity or other motives, and it would be unreasonable to hold that, by answering them, the conductor assumes for the company the obligation to watch the movements of the passenger, or unnecessarily delay the train in accordance with the answer. We think the obligation of the defendant was neither increased nor diminished by the conductor's answer in this case, if he made the answer, and that the court erred in holding to the contrary.

According to the rule announced by this court in the case of *Dallas & W. R'y Co.* v. *Spicker*, 61 Tex. 427, 48 Am. Rep. 297, the court also erred in its charge as to the burden of proof of contributory negligence. "When the plaintiff's own case shows a suspicion of negligence, then he must clear off such suspicion": Id. The law will not presume that a plaintiff

has been negligent in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his part did not in fact exist.

On account of the errors pointed out, the judgment is reversed, and the cause remanded.

Carriers of Passengers. — A passenger must inform himself, before taking passage on a railroad train, when, where, and how he can go or stop according to the regulations of the company: *Atchison etc. R. R. Co.* v. *Gants*, 38 Kan. 608; 5 Am. St. Rep. 780.

Carriers of Passengers — Duty with Respect to Passengers Alighting at Intermediate Stations. — A passenger leaving the train at an intermediate station surrenders for the time being his place and rights as a passenger, and assumes responsibility for his movements; but he may re-enter the train and resume his place and rights as a passenger: *State* v. *Grand T. R'y Co.*, 58 Me. 176; 4 Am. Rep. 258; *De Kay* v. *Chicago etc. R'y Co.*, 41 Minn. 178; 16 Am. St. Rep. But in the case of *Parsons* v. *New York etc. R. R. Co.*, 113 N. Y. 355, 10 Am. St. Rep. 450, where a passenger, who had not arrived at his own station, temporarily left the train from motives of curiosity or business at a regular station, it was held that if he intended to return to the train and continue his journey, he still retained his character as a passenger, and had the right to be protected by the regulations of the carrier company provided for the safety of passengers traveling upon its cars or using its station-grounds. And it is well settled that a passenger is still entitled to protection, as such, as well when leaving and returning to the vehicle of transportation at intermediate points of the journey, for a purpose naturally incidental to his passage, such as getting breakfast, as at any other time: *Dodge* v. *Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541. In the case of *Commonwealth* v. *Boston etc. R. R. Co.*, 129 Mass. 500, 37 Am. Rep. 382, where a train had overshot the regular station, and a passenger for such station got off while the train was still running, and was killed by another train while making his way back to the station, it was held that the company was not liable, as he had ceased to be a passenger: See note to this case, 37 Am. Rep. 384–387.

Negligence — Burden of Proof. — As to the burden of proof respecting negligence when a passenger is injured: Note to *Farish* v. *Reigle*, 62 Am. Dec. 679 et seq.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY *v.* NEWELL.

[73 TEXAS, 334.]

RAILROADS — PURCHASE OF ONE BY ANOTHER DOES NOT WORK CONSOLIDATION. — A purchase at sheriff's sale of one railroad franchise and corporate property by another railroad company does not destroy the corporate existence of the former. That existence continues as before, neither enlarged nor restricted. The purchaser takes the property freed from liability for existing debts not secured by prior liens and from all obligations strictly personal in character.

RAILROADS — PURCHASE DOES NOT CREATE CONSOLIDATION. — Ownership by purchase of one railroad by another railroad company will not alone operate a consolidation of the two without the consent of the state. This consent will not be implied, nor can it be effectual without the consent of the stockholders of the companies to be consolidated.

RAILROADS — OWNERSHIP — DUTY TO PUBLIC. — A railway, no matter who owns it, is charged with every duty and obligation to the public imposed upon it by its charter and the nature of its business, and from them it cannot escape without legislative permission, so long as its corporate existence continues, no matter if it is leased or otherwise controlled and operated by another person or corporation.

RAILROADS — OWNERSHIP — DUTIES TO PUBLIC. — When a railway company's charter imposes upon it obligations and responsibilities continuous in their nature, in the discharge of which individuals, as distinguished from the public, have an interest, such duties and obligations rest upon it in the hands of whomsoever may become the owner of its property and franchise, and such subsequent owner is bound by any covenant running with the property purchased.

RAILROAD — RIGHTS OF PURCHASER UNDER EXECUTION. — A person or corporation who acquires the property and franchise of a railway corporation through sale under execution takes them freed from all liability for former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner.

RAILROADS — PURCHASE UNDER EXECUTION — CONSOLIDATION — ESTOPPEL. — Purchase of the property and franchise of one railway under execution by another railway company does not of itself work a consolidation of the two companies, nor is the purchaser estopped from denying the fact of consolidation.

J. W. Terry, for the appellant.

W. P. McComb, for the appellee.

STAYTON, C. J. Appellee brought this action against the Gulf, Colorado, and Santa Fé Railway Company to recover damages for the breach of a contract which he alleges the Central and Montgomery Railway Company made with him and other residents of the town of Montgomery in the year 1879.

He alleged that this contract was evidenced by a subscrip-

tion list, the caption of which provided that, in consideration the subscribers would pay the sums each subscribed, the Central and Montgomery Railway Company would establish, build, and maintain permanently its depot at some point within one thousand yards of the court-house in the town of Montgomery; and that he subscribed and paid to the railway company the sum of one hundred dollars.

He further alleged that, in compliance with this contract, the Central and Montgomery Railway Company, in the year 1879, did construct and maintain its depot within the named distance from the court-house, where it remained until about September, 1885; but that, about the month of June, 1882, the Central and Montgomery Railway Company ceased to control and operate its railway, and to exercise its rights and franchises, which passed into the possession and control of appellant under some contract, pretended purchase, or by usurpation, and that since that date, appellant has continuously managed and controlled the railroad property and franchises of the other railway company.

He further alleged that, about the month of September, 1885, appellant, in violation of the contract between himself and other citizens of the town of Montgomery and the Central and Montgomery Railway Company, established a depot at a point more than one thousand yards from the court-house in the town of Montgomery, where it has since transacted its business, abandoning the depot formerly established and used; that after making the contract on which he sues, he bought property in the town of Montgomery, which has been greatly depreciated in value by the removal of the depot; and for damages thus sustained, he brings this action based on the contract before referred to.

There is no averment that the two railway companies have been voluntarily or involuntarily consolidated or amalgamated; nor is there any averment from which this can be inferred, or from which it can be inferred that the Central and Montgomery Railway Company is not an existing corporation, clothed with all the rights, powers, and franchises it ever possessed.

Appellant filed demurrers to the petition, which are as follows:—

1. "The defendant excepts to the plaintiff's petition, and says that it appears therefrom that the Central and Montgomery Railway Company is a proper and necessary party

defendant in this case, and this action ought not to proceed without said company is a party."

2. "For further exception to said petition, defendant says that the same states no facts which show or tend to show that the defendant is liable on the contract or breach of contract alleged to have been made with the Central and Montgomery Railway Company."

These demurrers were overruled, and this ruling is assigned as error.

Appellant pleaded general denial, and by special answer alleged, in substance, that for a valuable consideration it purchased from George Sealy, who was the sole stockholder in the Central and Montgomery Railway Company, all of its bonds having been paid off and destroyed, the Central and Montgomery railway free from all debts,—stock, bonds, or otherwise; that upon the faith of such purchase its officers took possession of the road, and operated the same under color thereof until September 6, 1887; that it had no notice of appellee's contract, and never in any manner assumed the obligations of the Central and Montgomery Railway Company; that on September 6, 1887, it purchased at sheriff's sale, under a valid judgment, execution, and levy (which are particularly described), the entire road-bed, track, franchises, and charter of the Central and Montgomery Railway Company, its right of way, and depot-grounds, being its entire line from Navasota to Montgomery, to all of which, on the same day, the sheriff executed and delivered to it a deed in due form of law; that all acts of its officers in the premises down to September 6, 1887, were *ultra vires*, and that on that day by said purchase and sheriff's sale it acquired the property free from all claims against the Central and Montgomery Railway Company which were not liens on the same prior to the said judgment.

Demurrers to the special answer were sustained, and this ruling is assigned as error.

These rulings present the main questions to be determined in the case.

If, giving to the petition the broadest intendments possible under its averments, there could be doubt as to the true relations between the two railway companies, the answer would have left no ground for controversy as to this; and if, looking to the entire pleadings of both parties, admitting the averments of both to be true for the purposes of the demurrers, it appears that the plaintiff showed no right to maintain this action

against appellant on the contract of the other railway company, then the judgment must be reversed.

The relation of appellant to the Central and Montgomery Railway Company, under the purchase from George Sealy, was considered in *Gulf etc. R'y Co.* v. *Morris*, 67 Tex. 696, wherein it was held that the title to the Central and Montgomery railroad and its franchises did not pass to appellant through that transaction, and that its corporate existence continued.

The purchase at sheriff's sale, set up in the answer, if it be conceded that appellant had power to buy, did not destroy the corporate existence of the Central and Montgomery Railway Company, but vested in appellant the franchise and corporate property sold, freed from liability for existing debts not secured by prior liens, and from all obligations of that company strictly personal in character.

The appellant at most became the owner of the corporate franchise of the Central and Montgomery Railway Company and of the property sold, just as would any individual who might have purchased at the sheriff's sale.

Ownership alone does not operate a consolidation; for this cannot be made without the consent of the state, which will not be implied; nor can it be made without the consent of the stockholders of the companies to be consolidated: *Pearce* v. *Madison etc. R. R. Co.*, 21 How. 442; *State* v. *Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Tuttle* v. *Michigan etc. R. R. Co.*, 35 Mich. 247; *Mowrey* v. *Indianapolis etc. R. R. Co.*, 4 Biss. 78; *Shelbyville etc. Turnpike Co.* v. *Barnes*, 42 Ind. 498; *Bishop* v. *Brainerd*, 28 Conn. 288; Taylor on Corporations, 419 et seq.; Morawetz on Corporations, 544; Rorer on Railroads, 588; *Houston etc. R. R. Co.* v. *Shirley*, 54 Tex. 125; *Indianola R. R. Co.* v. *Fryer*, 56 Id. 609; *Clinch* v. *Corporation*, L. R. 4 Ch. 118; *Dongan's Case*, L. R. 8 Ch. 540.

There being no consolidation alleged, it is unnecessary to consider whether or not, had there been, the consolidated company would be liable on the contract made the basis of this action.

The statute provides that "in case of the sale of the entire road-bed, track, franchise, and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter or by virtue of the general laws;

and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof in the same manner and to the same extent as if they were the original corporators of said company, and shall have power to construct, complete, equip, and work the road upon the same terms and under the same conditions and restrictions as are imposed by the charter and the general laws": R. S., art. 4260.

By the sale made by the sheriff there was a change made in the ownership of the Central and Montgomery railroad, and of its franchise, but the corporate existence continues, with franchise neither enlarged nor restricted, as before.

A railway company, in whomsoever may be its ownership, stands charged with every duty and obligation to the public imposed upon it by its charter and the nature of its business, and from those it cannot escape without legislative permission, so long as its corporate existence continues. If it leases its road, or otherwise permits it to be controlled and operated by another corporation, without lawful authority, it will remain liable for any breach of duty to the public as fully as though its road was operated under the control of its own directory, while at the same time the same liability may exist on the part of the corporation operating its road.

If its charter imposes upon it obligations and responsibilities continuous in their nature, in the discharge of which individuals, as distinguished from the public, have an interest, then such duties and obligations rest upon it in the hands of whomsoever may become the owner of its property and franchise; and such subsequent owner would be bound by any covenant running with the property purchased.

A person or corporation, however, who acquires the property and franchise of a railway corporation through sale under execution takes it freed from all liability for its former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner.

That appellant is not liable on the contract made the basis of this action, under the averments of the pleadings seems to us clear. The contract was one personal in its character, which could not fix any obligation whatever on appellant: *City of Menasha* v. *Milwaukee etc. R. R. Co.*, 52 Wis. 420; *Wright* v. *Milwaukee etc. R'y Co.*, 25 Id. 46; *Sappington* v. *L. R. etc. R'y Co.*, 37 Ark. 23; *Tawas etc. R. R. Co.* v. *Judge*,

44 Mich. 479; *Hammond* v. *Port Royal etc. R'y Co.*, 16 S. C. 573.

If the contract sued upon has not become binding on appellant, we do not see that its refusal to comply with it gives cause of action, either on the contract or for tort against it; for there is no privity between them, nor duty raised by the contract.

It is urged that appellant is estopped to deny the fact of consolidation. We do not see on what ground an estoppel can be based. Appellant has done no act which, in any manner, influenced appellee to make the contract on which he relies, believing that it was bound to execute it.

It claims, at most, to be the owner of the railway and franchise of the corporation known as the Central and Montgomery Railroad Company, and, by virtue of such ownership, claims the right to operate and control that property and franchise, which, if it be such owner, it may lawfully do without consolidation, and cannot lawfully do as a consolidated corporation under the averments of the petition.

It is unnecessary to inquire whether appellee, under the contract alleged, has cause of action against the representatives of the interests of those interested in the assets of the sold-out company.

The demurrer to the petition should have been sustained, and the demurrers to the answer should have been overruled; and for the errors in the ruling of the court below in these respects, the judgment will be reversed, and the cause remanded.

CONSOLIDATION OF CORPORATIONS. — For a general discussion of the subject of consolidation of corporations, see extended note to *McMahan* v. *Morrison*, 79 Am. Dec. 422–428.

A PURCHASER OF A RAILROAD and its franchises at a marshal's sale becomes vested with all its franchises: *Lawrence* v. *Morgan's etc. S. S. Co.*, 39 La. Ann. 427; 4 Am. St. Rep. 265.

MISSOURI PACIFIC RAILWAY COMPANY *v.* RICHMOND.

[73 TEXAS, 568.]

PLEADING AND PRACTICE. — ACTION SHOULD NOT BE DISMISSED although a cost bond may not have been filed within the time prescribed by statute, if it is tendered before the case is actually dismissed, and an affidavit of inability to give security for costs will supply the place of a cost bond.

LIBEL. — CORPORATION MAY BECOME CIVILLY RESPONSIBLE for libel in damages, actual or exemplary.

LIBEL. — EXEMPLARY DAMAGES MAY BE AWARDED AGAINST CORPORATIONS, when it is shown that they have published a libel with express malice.

LIBEL — ACTIONABLE LANGUAGE. — PUBLICATION BY CORPORATION about an employee that he was discharged for carelessness is susceptible of a libelous meaning.

LIBEL — ACTIONABLE LANGUAGE CONCERNING PERSON IN HIS EMPLOYMENT. — Language which concerns a person in a lawful employment is actionable, if false and published with malice, and if it affects him in such employment in a manner that may, as a necessary consequence, or does, as a natural consequence, prevent him from deriving therefrom that pecuniary reward which, probably, otherwise he might have obtained.

LIBEL. — RAILROAD COMPANY HAS A RIGHT TO PRINT AND CIRCULATE to its officers and employees a discharge list, in order to guard against reemploying men who have proved themselves incompetent and untrustworthy, and an ex-employee, whose name appears thereon as discharged for carelessness, cannot maintain libel against the company in the absence of proof that such publication was known to be false and actuated by malice, and if false, but not published with malice, the company might be liable in libel to actual but not to exemplary damages.

LIBEL — PRIVILEGED COMMUNICATIONS. — A communication made in good faith, in reference to a matter in which the person communicating has an interest, or in which the public is interested, is privileged, if made to another for the purpose of protecting that interest; or if it is made in the discharge of a duty, and looking to the prevention of wrong toward another or the public, it is privileged if made in good faith; and in such case, even if the statement made is untrue, malice is not implied, but must be proved.

LIBEL — PRIVILEGED COMMUNICATION. — Where a publication by a railway company of its discharged employees is placed in the hands of an agent of another railway company to enable it to avoid the employment of unsuitable persons, whether communicated by request or not, looking to the public interests involved, it is not an actionable publication so long as the communication is made in good faith, and believed to be true.

LIBEL — PRIVILEGED COMMUNICATIONS. — A railway company having reason to believe that a discharged employee, seeking an important position in the railway service, is incompetent, careless, or otherwise unfit, is under obligation to communicate its knowledge or belief to all who are likely to employ him in such service, and if such published communication is made in good faith, it is privileged.

Clark, Dyer, and Bolinger, for the appellant.

Anderson, Flint, and Anderson, for the appellee.

Stayton, C. J. The nature and result of this action is thus correctly stated in brief of counsel for appellant:—

"Appellee sued appellant for three thousand dollars as actual and twenty thousand dollars as exemplary damages, claimed to have resulted to him on account of alleged libelous matter claimed to have been made and published of and concerning appellee by appellant, charging, substantially, as follows: That appellant composed and published a certain discharge list in February, 1884, which was in the form of a printed pamphlet, and which contained, among other names, the name of appellee, the particular matter complained of in said pamphlet being, in substance, that 'A. F. Richmond,' a 'conductor' on the 'I. & G. N.,' was 'discharged' in 'July, 1883,' for 'carelessness'; appellee claiming that said publication was circulated among all railroad men in the country, both in and out of Texas, and that it greatly damaged him in his reputation, and prevented him from ever afterward getting railroad employment, or employment of any kind, notwithstanding he made repeated applications for employment; that the matter alleged to have been printed and circulated was false and scandalous, and was composed and published maliciously by appellant. Appellant excepted generally and specially to plaintiff's petition, and set forth that the matter was not a libel, for the reason that it was not defamatory of appellee; that the innuendoes set forth by appellee were not justified by the plain import and meaning of the words, and that appellant was a corporation, and not capable of bearing malice, and not liable for exemplary damages, etc. Appellant also pleaded a general denial, and specially one year's statute of limitation, and that said publication was composed and published by appellant in the proper and necessary course and conduct of its business as a common carrier of freight and passengers; that in the management of its numerous lines and different divisions of its railway, traversing several different states, it was impossible to properly guard against the re-employment of unworthy men without some such list as the one complained of; that all the information contained in the list was true, and especially the matter stated of and concerning appellee; that he was discharged for gross carelessness in his business as conductor for defendant in July, 1883, and for a total failure to observe or comply with the well-known rules and proper regulations of appellant; that the matter published was not false in any particular, but true, and that

same was without malice, but done in discharge of a duty defendant owed to the public as well as to itself, by reason of the public nature of its business, and that the publication was absolutely privileged matter. Appellee, by trial amendment, pleaded that the printed matter was composed and published by A. A. Talmage, the fourth vice-president and general manager of defendant, to which plea appellant specially excepted, and then pleaded a general denial. The court overruled all of appellant's exceptions, and the cause went to the jury, who, after hearing all the evidence and charge of the court, returned a verdict for appellee for $250 actual damage, $1,750 exemplary damage, and judgment was rendered in accordance with the verdict."

On December 16, 1885, appellant caused a rule to be entered requiring appellee to give security for costs; and this not having been done, on the fourth day of the succeeding term a motion to dismiss was filed.

On the second day after this, appellee, in accordance with article 1438, Revised Statutes, filed an affidavit of inability to give security for costs, which had been made some days before, and, it seems, placed in the hands of his counsel.

Appellee was not present, and his counsel filed a sworn statement to the effect that the rule had been entered at the former term after the cause had been disposed of for the term, and without notice; that it had been agreed between counsel the cause would not be called for trial before the fifth week of the term then pending, which the record shows was observed, and that the affidavit filed had been prepared and placed in the hands of counsel in consequence of a suggestion of the clerk that he would ask security for costs.

The court overruled the motion to dismiss, and this ruling is assigned as error.

The statute is no more stringent now than heretofore; and from the early days of this court it has been held error to dismiss an action, although a cost bond may not have been filed within the time prescribed, if tendered before the case was actually dismissed: *Cook* v. *Beasely*, 1 Tex. 591; *Rhodes* v. *Phillips*, 2 Id. 162; *Hays* v. *Cage*, 2 Id. 504.

The affidavit supplied the place of a cost bond.

An exception to the petition was overruled which questioned the capacity of a corporation to publish a libel, and denied appellant's responsibility for damages, actual or exemplary,

on account of a publication which, if made by an individual, would be libelous.

Whatever controversy may at one time have existed, it must now be held that a corporation may become civilly responsible for libel: *Philadelphia etc. R. R. Co.* v. *Quigley*, 21 How. 202; *Howe Machine Co.* v. *Souder*, 58 Ga. 65; *Maynard* v. *Firemen's F. Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *Maynard* v. *Firemen's F. Ins. Co.*, 47 Cal. 207; *Boogher* v. *Life Ass'n*, 75 Mo. 319; 42 Am. Rep. 413; *Evening Journal Ass'n* v. *McDermot*, 44 N. J. L. 431; 43 Am. Rep. 392; *Aldrich* v. *Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447; *Hewitt* v. *Pioneer Press Co.*, 23 Minn. 178; 23 Am. Rep. 680; *Vinas* v. *Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; Morawetz on Corporations, 727; Townshend on Libel and Slander, 265; Cooley on Torts, 136.

The rule now recognized is, that corporations, like individuals, may become liable for damages exemplary in character, and the main controversy has been, as to whether they become so liable when the wrong committed is such as would authorize the imposition of such damages on the guilty agent, or whether it must be shown that the managing agents of the company directed the wrongful act or subsequently ratified it.

That exemplary damages may be awarded when it is shown that a libel has been published with express malice, as in other classes of torts done maliciously or wantonly, is well settled: *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447; *Hewitt* v. *Pioneer Press Co.*, 23 Minn. 180; 23 Am. Rep. 680; *Hunt* v. *Bennett*, 19 N. Y. 173; *Gilreath* v. *Allen*, 10 Ired. 69; *Cramer* v. *Noonan*, 4 Wis. 231; *Hosley* v. *Brooks*, 20 Ill. 116; 71 Am. Dec. 252; *Snyder* v. *Fulton*, 34 Md. 128; 6 Am. Rep. 134; Townshend on Libel and Slander, 506, 538.

The petition alleged that, by the language used, appellant meant and intended to charge that appellee was careless in his business and employment as conductor, and that he was so careless and unworthy of employment at the date of publication, and it is claimed that the language was not susceptible of the meaning attached to it, and that in so far an exception to the petition should have been sustained.

It seems to us that such was the natural import of the language alleged to have been used, and that the ruling of the court, in this respect, was correct.

Appellee alleged that his employment was that of conductor in the railway service, and that in this and in all lower

grades of that service, by long experience, he had become proficient, capable, and skillful, and that by reason of the publication complained of he had since been unable to obtain employment, whereby he was damaged.

It is claimed, in view of these facts, that the publication was not libelous, and that an exception presenting this question should have been sustained.

The occupation alleged was one lawful in character, and we understand that "language which concerns the person in such employment will be actionable if it affects him therein in a manner that may as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained,"—is actionable: Townshend on Libel and Slander, 182.

If, as alleged in the petition, the pamphlet containing the language complained of was by appellant placed in the hands of those charged with the duty of employing conductors on the different lines of railway through the country, it seems to us that the effect of this would be to prevent his obtaining employment in that business for which, he alleges, he had fitted himself by many years' service, and if the charge was untrue. and published with actual malice, as alleged, it was libelous,

There is a conflict in the evidence as to whether the language of which appellee complains was true.

On his part there is much evidence tending to show that he was a careful and skillful conductor, but on the other hand, there is much evidence showing specific and repeated acts of carelessness and disregard of duty.

The evidence, however, does show that such reports were made, by those persons whose immediate duty it was to supervise the appellee, to the officers of the company, who caused the pamphlet to be printed, as would not only have justified the publication to be made, but as would have required it to be made, or in some manner the same facts to have been made known to all persons whose duty it was to make employments for appellant.

It was shown that appellant was operating about six thousand miles of railway, and had in its employment about twenty-four thousand employees, and without some such source of information it was impossible to prevent the reemployment of an employee on one part of the line when discharged from another for cause, which made it the duty of

appellant to its employees, the public, and itself not again to receive the discharged person into its service.

There is no evidence tending to show that the persons who gave information on which the publication was made were not worthy of credit, or that they acted through any other motive than a desire to guard those whose duty it was to employ from employing persons unfit for employment in railway service; nor is there evidence showing that the pamphlet containing the language complained of was ever placed by the officers of appellant company in the hands of any person other than its own employees, to whom it was proper to give information necessary to guide them in the selection of persons to serve the company. This it was the right of the appellant to do; and while it might be liable for actual damages for so doing, if the publication was false, it is certainly true that no inference of the existence of actual malice could be drawn from the facts shown by the record before us. There can be no pretense that the officer of the company who caused the pamphlet to be published was actuated by ill-will toward or desire to injure appellee, who was a stranger to him. The evidence of that officer, uncontradicted, was, in substance, that he had the pamphlet published; that it was not issued with any bad feeling or malice toward plaintiff or for the purpose of injuring him or any one else; that the book was gotten up for the personal convenience and private information of the officers of the company only, in order that they might protect the lives and property of the public, and also the interests of the defendant, by securing to the company only good, careful, and reliable men; that he did not know plaintiff, that there were about twenty-four thousand persons in the employ of defendant at the time the pamphlet was printed; that it was necessary to have this discharge list in order to guard against re-employing men who had proved themselves incompetent or untrustworthy; that he printed about one hundred copies of the book, and sent them to officers of the company only, and if one ever got outside of keeping of proper officers, it must have been surreptitiously obtained.

We understand the law to be, that a communication made in good faith in reference to a matter in which the person communicating has an interest, or in which the public has an interest, is privileged, if made to another for the purpose of protecting that interest, and that a communication made in the discharge of a duty, and looking to the prevention of

wrong towards another or the public is so privileged when made in good faith. In such cases, although the statements made may have been untrue, malice cannot be implied from the fact of publication, and to sustain an action in which the existence of evil motive must be proved.

In the case of *Harrison* v. *Burk*, 5 El. & B. 348, it was said: "A communication made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege, would be slanderous and actionable. . . . . 'Duty,' in the preferred canon, cannot be confined to legal duties which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation."

"When words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice. If the occasion is used merely as a means of enabling the party to utter the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse": *Bradley* v. *Heath*, 12 Pick. 164; 22 Am. Dec. 418; *Noonan* v. *Orton*, 32 Wis. 112; *Harper* v. *Harper*, 10 Bush, 455; *Harwood* v. *Keech*, 4 Hun, 390; Townshend on Libel and Slander, 241–245.

This action is based on the proposition that the publication was made by a representative of the appellant corporation in the course of his employment or in the discharge of the duties of his office, and that for this reason appellant, corporation though it is, is in law the maker and publisher of the libel.

In the discharge of the duties imposed upon that officer, it was his duty to appellant and to the public alike to see that none but competent and careful men were employed to conduct its business, which, when conducted with the utmost care, is always attended with great danger. This duty he could not discharge in person throughout all the lines operated by appellant, and it became necessary that persons on differ-

ent parts of the line should be clothed with power to employ servants. The officer having been informed by a credible person or persons that appellee was not a careful man, that he had been careless in the discharge of his duties as a conductor to such extent as to make his discharge necessary, it became his duty to place this information in the possession of all persons having power to employ, and a failure to do so would have been a breach of duty. A publication so made is not actionable, in the absence of actual malice; and as there was no evidence of this, the court below should not have submitted a charge under which the jury could have found in favor of appellee any exemplary damages.

We are further of the opinion that the court should have granted a new trial, on the ground that there was no evidence sufficient to show express malice; for in the absence of this, the language complained of, under the circumstances of the publication, was not actionable, and appellee therefore not entitled to damages, either actual or exemplary.

If, as claimed by appellee, the publication had been placed in the hands of the agents of other railway companies, without malice, but for the sole purpose of enabling such agents to avoid the employment of unsuitable persons, whether so communicated by request or not, looking to the public interests involved, we do not see that such a publication would be actionable.

It seems to us that any person who, upon reasonable grounds, believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject-matter of the communication.

Mr. Townshend states even a broader rule, which does not require that reasonable or probable cause for the belief should exist: Townshend on Libel and Slander, 241.

The rule is illustrated by this author in the cases cited by him to sustain the proposition that a former employer may, without rendering himself liable in any action for libel, in good faith state, with or without previous request, what he may believe to be true of one formerly in his employment.

Looking to the public interests involved in the safe operation of railways, as well as the interests of their owners, it seems to us that one having reasonable ground to believe that

a person seeking an important position in that service was incompetent, careless, or otherwise unfit would be under such obligation to communicate his knowledge or belief to all persons likely to employ such unsuitable person in that business as would make the publication privileged, if made in good faith.

Appellee alleged that he sought employment from many railway companies, and that he had been refused employment on account of the publication of which he complains, but he did not allege the names of the persons to whom he had made application, and for the want of such averments his evidence on this point was objected to.

We are of opinion that the averments of special damages were sufficient on general demurrer, and that if appellant desired more specific averments as to the persons who had refused employment to appellee, it should have called for this by pointing out the specific defect by proper exception.

For the errors noticed, the judgment of the court below will be reversed, and the cause remanded.

CORPORATIONS ARE RESPONSIBLE FOR THE PUBLICATION OF LIBELS, when made by their authority or ratified by them, or made by their servants or agents in the course of their employment: *Fogg* v. *Boston etc. R. R. Corporation*, 148 Mass. 513; 12 Am. St. Rep. 583, and note.

EXEMPLARY DAMAGES. — As to when exemplary damages may be recovered: Note to *Newman* v. *Stein*, 13 Am. St. Rep. 452.

PRIVILEGED COMMUNICATIONS ARE ACTIONABLE as libel, when published in malice, which must be expressly proved: *Bradstreet Co.* v. *Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Chaffin* v. *Lynch*, 84 Va. 884; *Stewart* v. *Hall*, 83 Ky. 375; *Kent* v. *Bongartz*, 15 R. I. 72; 2 Am. St. Rep. 870, and note.

PRIVILEGED COMMUNICATION, WHAT IS. — To be privileged, a communication must be made upon a proper occasion, from a proper motive, and based upon a proper and reasonable cause: *Press Co.* v. *Stewart*, 119 Pa. St. 585; *Holt* v. *Parsons*, 23 Tex. 9; 76 Am. Dec. 49.

LIBEL — MOTIVE OF PUBLISHER. — If defendant, in publishing an article claimed to be libelous, acted from an honest motive to protect the public against impostors, this fact may rebut malice, and mitigate damages: *Mosier* v. *Stoll*, 119 Ind. 244. Newspaper libel: Note to *McAllister* v. *Detroit Free Press Co.*, *ante*, p. 333–369.

FAILURE TO FILE COST BOND. — The failure of a plaintiff in an action for slander to file an undertaking for costs before the issuance of the summons does not deprive the court of jurisdiction; and a dismissal of an action on account of such failure is erroneous, when a proper undertaking is filed at the time of the making of a motion to dismiss: *Stinson* v. *Carpenter*, 78 Cal. 571.

CRAVENS v. WHITE.

[73 TEXAS, 577.]

MARRIED WOMAN'S DEED, in which she is not joined by her husband nor privily examined, is invalid.

DEEDS — CONSTRUCTION. — When the intention of the grantors clearly appears from the face of a deed, effect must be given thereto, however unusual the form of the deed, unless the repuguancy in its clauses is such as to render the deed utterly void.

DEEDS — EXCEPTION — CONSTRUCTION. — Where it clearly appears to have been the intention of the parties to a deed to except part of the property embraced in the general description, from its operation effect will be given to such intent, unless the repugnancy is such as to render the exception void.

PARTITION. — MARRIED WOMAN'S DEED IN VOLUNTARY PARTITION not acknowledged nor signed by the husband may be enforced when it appears that all parties in interest regard the property thus conveyed by her as part of the partition, and she has acted upon it as such, by accepting other property conveyed to her in the general partition.

Richard B. Semple, for the appellants.

STAYTON, C. J. Appellee brought this action to recover 120 acres of land, a part of a survey granted to the heirs of James Dougherty as a part of his headright.

The survey of which the land in controversy is a part contains 526 acres, and the balance of the headright, which consisted of 1,280 acres, seems to have been embraced in another grant, which also descended to the heirs of James Dougherty.

His heirs were his children, Andrew Dougherty, Sarah Thomas, the appellee, and the children of a deceased son.

On the trial, the following deeds were offered in evidence: 1. Deed by A. Dougherty and co-heirs, except plaintiff, conveying to plaintiff a tract of 190 acres out of the James Dougherty survey, embracing the premises in controversy, dated December 26, 1860; 2. Deed from plaintiff and co-heirs, except A. Dougherty, conveying to A. Dougherty 90 acres of 331 acres patented to James Dougherty, dated December 26, 1860; 3. Deed from A. Dougherty and co-heirs, except heirs of Charles Dougherty, to Polly Ann Dougherty, for herself, and as guardian of minor heirs of Charles Dougherty, conveying 320 acres patented to James Dougherty; 4. Deed from plaintiff and co-heirs, except A. Dougherty, conveying to A. Dougherty 16 acres of said James Dougherty survey, dated December 26, 1860.

These deeds all bear date December 26, 1860. The consideration mentioned in them all is certain relinquishments made

by the grantees to portions of the 1,280 acres headright lands of James Dougherty, which are located in Fannin County. These deeds do not dispose of one half of the 1,280 acres, though plaintiff proved that Sarah Thomas had a similar deed for her part of the Dougherty survey, but it is not shown how many acres she got. Prior to the date of these deeds, plaintiff had sold to A. Dougherty the premises in controversy, her deed to him bearing date October 7, 1859. In this deed, however, her husband did not join, nor did he join in any of the deeds to the several heirs. In the partition deed that plaintiff received for the 190 acres, the following language appears:—

"Furthermore, this deed is not to interfere or in the least conflict with or include any part or parcel of 120 acres heretofore deeded to said Andrew Dougherty by said Nancy M. White; but the right to said A. Dougherty, made as aforesaid, holds good, and the 120 acres is yet held and owned by A. Dougherty in and out of said 190 acres."

The court below found that those several deeds were made in partition of the estate of James Dougherty, and this is probably true, but it is evident that the entire partition is not shown.

The court below properly held the deed executed to Andrew Dougherty, of date October 7, 1859, by appellee, invalid, because she was neither joined by her husband nor privily examined, and rendered a judgment in her favor for the land.

Appellants Cravens claim the land through a deed made by Andrew Dougherty subsequent to the deed made to him by appellee.

To sustain the judgment, it must appear that appellee has title in severalty to the 120 acres of land for which she sues; for, otherwise, she cannot recover from appellants, who claim under and through title from Andrew Dougherty, who, as co-heir of appellee, had originally the same interest as she. She is not, then, entitled to the judgment rendered in her favor through inheritance from her father. The only other right shown by her comes through the deed executed to her by Andrew Dougherty and co-heirs, of date December 26, 1860. That deed, in describing the land, speaks of the tract as one containing 190 acres, but it is evident that this was intended only to be descriptive of the tract.

The concluding clause of that deed shows clearly that it was not the intention of its makers that the 120 acres of land therein referred to should pass to appellee, and however un-

usual the form of the deed may be, effect must be given to the intention of the makers.

There is more or less repugnancy in the provisions of all deeds in which a part of the thing embraced in the general description is excepted from the operation of the instrument, but in this case we are of opinion that the repugnancy is not such as to render the exception void.

That deed was executed by Mrs. Thomas, who was an equal heir with appellee and Andrew Dougherty, and it was executed by those who assumed to represent the interest of another son of James Dougherty, and on its face shows as clearly the intention of those persons, as well as Andrew Dougherty, that he should hold the 120 acres, as it would have shown an intention that appellee should hold the entire tract, embracing the smaller, had not the excepting clause been inserted in the deed.

Appellee must have understood, when she received that deed, that its makers did not intend she should thereby become entitled to the land she now seeks to recover, for there is no uncertainty in the language of the deed in this respect.

It negatives any intention on the part of any one of its makers by it to confer on appellee any right to the land in controversy, and even goes further, and attempts to validate the deed made by appellee to Andrew Dougherty.

What effect the acceptance of this deed by appellee ought to have upon her former deed cannot be ascertained from the facts before us; but if it should be made to appear that the deed through which appellee attempted to convey the land in controversy to Andrew Dougherty was regarded as a part of the general partition of the estate of James Dougherty, and that she received her entire interest in the estate in property other than that in controversy, then she ought to be held to have made, through her deed and the acceptance of the deed in question, a valid partition of the estate of her father; for this she might legally have done by parol: *Wardlow* v. *Miller*, 69 Tex. 399.

The land in controversy seems susceptible of identification, and unless appellee is precluded from claiming any part of it by reason of equities growing out of a general partition of her father's estate, she is still the owner of an undivided one-fourth interest in it, for the mere acceptance of the deed in controversy, as the case is now presented, cannot be held to divest the interest which she took by inheritance, nor to estop her

from claiming that, but she does not now show that she owns a greater interest in the land. It is evident that the record does not show all that was done in the partition of the estate of James Dougherty, and it would be useless to speculate on probabilities suggested by it.

Believing that the evidence does not sustain the judgment, it will be reversed, and the cause remanded.

CONSTRUCTION OF DEEDS. — When the intention of the parties to a deed appears upon its face, such intention must be given effect: *Peden* v. *Chicago etc. R'y Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680; *Sharp* v. *Hall*, 86 Ala. 110; 11 Am. St. Rep. 28; *Post* v. *Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809, and note.

MARRIED WOMEN — ESTOPPEL. — The doctrine of estoppel may be applied to married women: *McDanell* v. *Landrum*, 87 Ky. 404; 12 Am. St. Rep. 500, and note 503, 504.

MARRIED WOMAN'S DEED, to be valid, must be executed precisely as directed by the statute: *Cox* v. *Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79, and note.

CATES *v.* SPARKMAN.

[73 TEXAS, 619.]

CORPORATIONS — WHAT NECESSARY TO ENABLE STOCKHOLDER TO MAINTAIN SUIT AGAINST. — To enable an individual stockholder to maintain suit in equity against a corporation, to recover damages for depreciation in the value of stock and corporate property occasioned by the fraudulent practices and conduct of its officers and directors, he must allege and show a refusal, or virtual refusal, of the corporation to sue, that there has been a breach of duty, and that there has been injury to the stockholder suing.

CORPORATIONS — SUIT BY STOCKHOLDER AGAINST. — To justify interference with the business of a corporation, there must exist, as a foundation for suit, some action or threatened action by its officers and directors which is beyond the power conferred by its charter, or such fraudulent transaction, contemplated or completed among themselves or with others, as will result in serious injury to the stockholder suing.

CORPORATIONS — RIGHT OF ACTION AGAINST, FOR FRAUD OR NEGLIGENCE. — Where the officers or directors of a corporation, or some of them, cause a loss of corporate property by negligence or culpable lack of prudence, or fraudulently misappropriate the corporate property in any manner, or obtain undue advantage, benefit, or property for themselves by contract, purchase, sale, or other dealings, under cover of their official functions, or in any manner commit a breach of their obligations, the corporation is the proper party to bring suit.

CORPORATIONS — WHEN STOCKHOLDER MAY MAINTAIN SUIT AGAINST. — The breach of duty by a corporation authorizing equitable suit by a share-holder for damage in the depreciation of his stock does not refer to mere mismanagement or neglect of the officers or directors in the con-

trol of the corporate affairs, or the abuse of discretion lodged in them in the conduct of the corporation business. To authorize such suit, there must be injurious acts *ultra vires*, fraudulent and injurious practices, abuse of power, and oppression on the part of the corporation or its officers, clearly subversive of the rights of the minority or of a stockholder, and which, without such suit, would leave him remediless.

EQUITY. — PARTY PRAYING FOR CANCELLATION of a conveyance must tender the money received thereon.

CONTRACTS — BREACH — DAMAGES. — SPECULATIVE OR PROSPECTIVE PROFITS are not proper elements to be computed in assessing damages for a breach of contract; but profits or advantages which are the direct result and fruits of the contract may be assessed for a breach thereof.

PLAINTIFF in error, a stockholder in the Wise County Coal Company, brought this writ of error from a judgment sustaining a demurrer and exceptions to a petition brought by him against the other stockholders and officers of the company for damages for fraudulently managing the business of the company, resulting in damage and injury to himself.

Crane and Trenchard, for the plaintiff in error.

Potter and Hughes, for the defendants in error.

HOBBY, J. Applying to the petition the most liberal and reasonable construction of which its language is susceptible, there are but two aspects in which the case made by it can be properly considered. Treating it first as a suit in equity by an individual stockholder of shares in an incorporated company against the latter to recover damages for the depreciation in the value of his stock and the corporate property, occasioned by the fraudulent practices and conduct of the officers and directors (and as such it is presented by the parties, the plaintiff contending that such a suit may be brought when said officers have "fraudulently conspired together to take advantage of plaintiff, or where they have fraudulently misapplied corporate property or funds, and the stockholder has suffered loss by depreciation in the value of his stock, or special damage, when the corporation refuses to sue, or the allegations are such as show a virtual refusal by the company to sue"), the question, then, is, Are the allegations sufficient to maintain this character of suit, when tested by the rules condensed from a comparison of the authorities, not altogether reconcilable in this class of cases?

It may be safely said that courts of equity, as a general rule, have not been disposed to exercise their jurisdiction, through suits like the present, to control or interfere in the

management of the corporate or internal affairs of an incorporated company. The company's business is left to the direction of the officers or managing board which, by the law creating it, may be clothed with the power and discretion to conduct its affairs in the manner which, in their judgment, is best calculated to promote its interests. To justify the interposition of the courts, there must exist, as a foundation for such suit, some action or threatened action of such board or officers which is beyond the power conferred by its charter, or such fraudulent transaction, completed or contemplated among themselves or with others, as will result in serious injury to the share-holder suing.

Where the directors or officers, or some of them, cause a loss of corporate property by negligence or culpable lack of prudence, or a failure to exercise these functions, or fraudulently misappropriate the corporate property in any manner, or obtain any undue advantage, benefit, or property for themselves by contract, purchase, sale, or other dealings under cover of their official functions, or in any manner commit a breach of their obligations, then the corporation is the party to bring the suit in equity. And whatever may be the nature of the wrong in cases of this character, whether intentional or fraudulent, or resulting from carelessness, negligence, or imprudence, and whatever may be the indirect loss occasioned to individual stockholders, no suit in equity against the wrongdoing directors or officers for relief can be maintained by an individual share-holder suing representatively for all others similarly situated, unless the corporation either actually or virtually refuses to prosecute: Pomeroy's Eq. Jur., sec. 1094; Thompson on Liability, 385; *Evans* v. *Brandon*, 53 Tex. 64.

The concurrence of three things are regarded as indispensable as the basis for such a suit: The company must refuse to sue; there must be a breach of duty; there must be injury to the stockholder: Thompson on Liability, 385.

The rule referred to, that it must be shown that the corporation refuses to sue, does not obtain where the allegations of the bill show that such request would have been useless, or if they show such facts as are tantamount to a "virtual refusal" to sue; as where the fact of the complicity in the alleged fraud by the controlling officers of the company appears from the averments so that the application would be unavailing, it need not be formally alleged to have been made, or that the present board connived at and approved of the act complained

of which the stockholder sought to impeach, it was held to be a sufficient excuse for not applying to the company: Thompson on Liability, 301.

This feature of the case before us, however, is comparatively free from difficulty, and therefore unimportant, as the allegations show that the plaintiff and defendants comprise all of the officers, directors, and stockholders constituting the company, and that as they are charged with the commission of the acts complained of, a request to the company to sue would have been useless. But the more serious question arises, whether the allegations show a concurrence of the other two conditions, namely, such breach of duty by the directors or officers of the company, and such injury to the plaintiff's stock, essential to maintain the action.

The breach of duty authorizing a suit by an individual stockholder for damage in the depreciation of his stock does not refer to mere mismanagement or neglect of the officers or directors in the control of the corporate affairs or the abuse of discretion lodged in them in the conduct of the company's business. On this ground the courts do not interfere.

The breach of duty or conduct of officers and directors which would authorize in a proper case the court's interference in suits of this character is that which is characterized by *ultra vires*, fraudulent and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority or of a share-holder, and which without such interference would leave the latter remediless: Thompson on Liability, 391; Pomeroy's Eq. Jur., sec. 1096. But if the acts or things are or may be that which the majority of the company have a right to do, or if they have been done irregularly, negligently, or imprudently, or are within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved, these would not constitute such breach of duty, however unwise or inexpedient such acts might be, as would authorize the interference by the courts at the suit of a stockholder.

To allow suits of this character would be to permit every share-holder who might be dissatisfied with the progress of the work or enterprise in which the company was engaged, or the manner in which it might be conducted by the directors or board authorized to conduct it, to institute his suit upon the ground that the enterprise or work of the company was not

being carried on or was being delayed or arrested in a manner not in his judgment conducive to the interests of stockholders. In the present case, it is alleged that after the defendants had expended about fifteen thousand dollars in money, employed hands, and purchased machinery, and placed the plaintiff in charge of the mines as superintendent to develop the same, the work under the directors continued for about two months, when, against his protest, some of the hands were discharged; that the work was then continued for four months, and at the expiration of that time the development of the mines was arrested, and the machinery sold to one of the company.

But it is not alleged that this was done in any manner other than that which the directors may have had a right to do or ought to have done to protect the stockholders from an unreasonable outlay. It does not appear that there was any fraud, oppression, or abuse of power on their part in arresting the development of the coal mines, or that this work could have been accomplished by any reasonable expenditure, or even that it was practicable or feasible to continue the work. It is not shown that the discretion lodged in the directors to prosecute the work was abused, or that if the mines had been developed there was any probability that the profits which might have been derived therefrom would have compensated for the outlay. There is nothing in the petition which negatives the idea that bankruptcy and ruin may not have resulted to the stockholders from a prosecution of the work.

We conclude, therefore, that that character of fraudulent practices, oppressive conduct, abuse of power, or illegal exercise of discretion subversive of the plaintiff's rights, are not shown on the part of the officers and directors of the company which are held to be necessary to maintain a suit of this kind.

"The injury to the stockholder," which, as we have seen, is an essential element in these cases, is not set forth with the certainty which the law requires in the most ordinary damage suits. The value of the plaintiff's stock is at no time clearly stated, nor what its value would have been if the undertaking had been successful. It does not appear that the land has been damaged. Its value before the incorporation of the company is not alleged. It is alleged, however, that plaintiff realized $10,600 upon one tract, and $4,375 upon another. Neither of these amounts are offered to be returned, though

the prayer is for a cancellation of the conveyances. We do not think this prayer could be heard unless the plaintiff himself offers to do equity by a tender of these sums.

As the case is presented, we are of opinion that the petition does not allege such facts as would authorize the suit by plaintiff as an individual stockholder against the company for damages in the depreciation of the value of his stock and injury to the corporate property: *Evans* v. *Brandon*, 53 Tex. 60.

Treating the case as one for damages for the breach of a contract by the defendants, and for the recovery of prospective profits which might have been realized if the contract to develop the mines and construct the railroad had been carried out, it is only necessary to say that what his stock would have been worth, and the probable enhanced value of the corporate property, if the enterprise embarked in had been successful, are elements of damage too remote to form the basis for a recovery, even if they had been alleged with sufficient certainty.

The rule as to the measure of damages announced in *Masterson* v. *Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38, and cited with approval in this state in *Waco Tap R. R. Co.* v. *Shirley*, 45 Tex. 372, and *Houston etc. R. R. Co.* v. *Hill*, 63 Id. 384, is, "that any supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into estimate. Besides, the uncertain and contingent issue of such an operation, in itself considered, has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered; but profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand on a different footing."

The purpose of the law is to compensate the party for the injury done him. In the case before us the plaintiff is not shown to have been injured. At his own suggestion an enterprise was entered into between the parties to develop upon the land coal mines. He is shown to have realized about fifteen thousand dollars in money from the defendants; that he

incurred no expense or outlay himself. If he has been damaged, it is not made apparent by the petition.

If the plaintiff should by proper averments state a case showing that upon a settlement of the affairs of the company and after the payment of its liabilities it is indebted to him for money or property advanced, he might be entitled to recover, but no such case is presented by the pleadings.

We think the judgment should be affirmed.

CORPORATIONS — STOCK AND STOCKHOLDERS. — The minority of the stockholders of a corporation may maintain a bill in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, and others participating therein; but they must set out in their complaint that they have exhausted all other means of redress: *Alexander* v. *Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337; compare *Rothwell* v. *Robinson*, 39 Minn. 1; 12 Am. St. Rep. 608, and particularly note.

EQUITY. — A person seeking relief in equity must do equity: *Yard* v. *Pacific Mut. Ins. Co.*, 13 N. J. Eq. 480; 64 Am. Dec. 467. So that one electing to rescind a contract must restore whatever he has received under it: *Woodbury* v. *Woodbury*, 47 N. H. 11; 90 Am. Dec. 555; extended note to *Johnson* v. *Evans*, 50 Id. 674.

DAMAGES. — Speculative damages are too remote to be recovered for a failure to perform a contract: *Abbott* v. *Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Cannon* v. *Folsom*, 2 Iowa, 101; 63 Am. Dec. 474; *Coweta Falls Mfg. Co.* v. *Rogers*, 19 Ga. 416; 65 Am. Dec. 602.

HARRIS *v.* DAUGHERTY.

[74 TEXAS, 1.]

PROCESS. — SERVICE BY PUBLICATION subsequent to attachment is sufficient to give jurisdiction to proceed to render judgment subjecting the property attached to the payment of the debt.

JUDGMENT RENDERED UPON SERVICE BY PUBLICATION, embracing a recital of the evidence upon which it was based, and in a case where there were no unknown heirs, was sufficient under the law of Texas as it existed in January, 1879.

EVIDENCE. — WRIT OF ATTACHMENT, regular upon its face, and upon which a judgment has been based, is presumed to have been properly issued, and a party relying thereon need not show the proper affidavit and bond, when offering the writ in evidence.

ATTACHMENT LIENS. — Prior to the adoption of the Revised Statutes of Texas it was not necessary, in order to give effect to an attachment lien, that the judgment should expressly recognize or enforce the lien; and in the absence of something in the judgment showing the attachment to have been abandoned, the lien continued in force and held the property subject to the payment of such indebtedness as the judgment should show to exist.

ATTORNEY AT LAW — PRIVILEGED COMMUNICATIONS. — Where a witness is the attorney for both parties in a transaction, communications made to him in the course of such business are privileged, except in a suit between the parties; but when the evidence is conflicting as to whether he is such attorney, his evidence may be properly admitted.

FRAUDULENT CONVEYANCES. — PAROL EVIDENCE IS ADMISSIBLE TO SHOW that a conveyance absolute upon its face was made upon trusts, or that it was made to hinder, delay, or defraud creditors. The rule is here applied where an attaching creditor attacks an absolute transfer by an insolvent attachment defendant for fraud.

PLEADING AND PRACTICE — INSTRUCTIONS. — The inadvertent use of the word "debtor," instead of "creditor," in an instruction, is not ground of complaint, when no harm could have resulted from the mistake.

J. M. Eckford, and Tarleton and Keller, for the appellant.

John A. and N. O. Green, Wælder and Upson, and John A. Green, Jun., for the appellee.

GAINES, A. J. This was a proceeding to try the rights of property in certain cattle and horses levied upon by virtue of a writ of attachment in favor of appellee against the property of John H. Slaughter, and claimed by appellant. The claimant, Harris, alleged title to the property by virtue of a bill of sale executed to him by Slaughter before the levy of the writ. The plaintiff in the writ, who is also styled plaintiff in this proceeding, attacked the bill of sale, upon the ground that it was made to hinder, delay, and defraud the creditors of the seller.

When this cause came on for trial the original suit of Daugherty against Harris had been determined, and had resulted in a judgment in favor of the plaintiff. During the progress of the trial of the present suit, plaintiff, Daugherty, offered in evidence that judgment, to which the defendant objected on the grounds, — 1. That it was a personal judgment, and that judgment had been rendered upon citation by publication, and there had been no appearance by the defendant; and 2. That no statement of facts was incorporated into the record, and no attorney appointed to represent the absent defendant. The objections were overruled, and the judgment admitted in evidence, and this ruling of the court is made the ground of the first assignment of error. The suit of Daugherty against Slaughter was originally instituted to foreclose a mortgage, and during its progress the attachment was sued out, which was levied upon the property in controversy. Without entering into any other question, we deem it sufficient to say that the service by publication was sufficient to give the court

jurisdiction to proceed to render a judgment which in legal effect subjected the property attached to the payment of the debt sued upon.

The judgment was rendered on the eighth day of January, 1879, and embraced a recital of the evidence upon which it was rendered. This was a compliance with the law as it then existed: Paschal's Dig., art. 1488; *Hill* v. *Baylor*, 23 Tex. 261; *Davis* v. *Davis*, 24 Id. 187. Before the Revised Statutes, it was only in cases in which unknown heirs were cited by publication that the court was required to appoint an attorney to represent the absent defendants.: Paschal's Dig., arts. 1488, 5460. We hold that in this case the law was complied with without deciding that a failure to comply in the particulars complained of would have rendered the judgment void for all purposes.

The plaintiff also offered in evidence the writ of attachment, which was also objected to by the defendant. The evidence was admitted, and the ruling is assigned as error. The grounds of objection were, that the affidavit and bond for attachment were not produced, and that the judgment did not condemn the property attached.

We think it was not incumbent upon plaintiff to show a proper bond and affidavit before offering the writ. A writ of attachment regular upon its face is presumed, in a case like this, to have been properly issued.

In *Wallace* v. *Bogel*, 66 Tex. 572, it is held that, before the adoption of the Revised Statutes, in order to give effect to the lien of an attachment, it was not necessary that the judgment should expressly recognize or enforce the lien, and that in the absence of something in the judgment showing that the attachment had been abandoned, the lien continued in force, and held the property subject to the payment of such indebtedness as the judgment should show to exist. Therefore the lien of the attachment was not waived by a failure to make an order in the judgment for the condemnation of the property attached, or by the failure therein to recognize the existence of the attachment. There was no dissolution of the writ or express waiver of the lien. The judgment was sufficient to subject the property attached to its payment, if subject to be seized as the property of the defendant in the writ.

The third assignment is, that "the court erred in permitting John R. Shook, Esq., to be examined as a witness by the plaintiff, over the objection of the defendant, because said Shook

had been of counsel for the defendant in this very suit, and in respect to the subject-matter thereof, and as counsel for both vendor and purchaser, had drawn the bill of sale under which defendant claimed this property."

The bill of exceptions shows that the attorney whose testimony was sought to be excluded drew the bill of sale, the validity of which is the subject of controversy in this suit,—the seller and purchaser both being present,—and that after this proceeding was instituted, Shook was employed by appellant to represent him in the suit. It further appears, however, that Shook accepted the employment, believing that it would not conflict with the interest of Slaughter, the seller, for whom he considered himself retained, and that a conflict of interest having been developed, he was discharged by appellant, and was paid for his services in this proceeding. As we understand the rule, the employment of the attorney in this suit would not exempt him from testifying to any communication made to him by appellant previous to that employment. He was called to testify as to the understanding of the parties at the time the bill of sale was executed, and it follows that, unless his testimony was privileged by reason of his relation to appellant as it existed at that time, his subsequent employment did not disqualify him.

This latter is a question of more difficulty. Preliminary to the court's ruling upon the evidence, Shook was examined upon his *voire dire*, and testified, in substance, that in drawing the bill of sale, and in the consultation which led to it, he acted as the attorney solely of Slaughter; that he had been his general attorney before, and had continued his attorney ever since, and that before the trial of the case he had received a letter from Slaughter expressly waiving his privilege, and consenting that the witness should make a full disclosure of the facts attending the transaction.

Before the ruling, Harris was also examined concerning the question of privilege, and testified, in effect, that he and Slaughter went together to Shook, and that he asked Shook to draw the bill of sale, and subsequently paid him for it. The rule is, that if the witness is the attorney of both parties in a transaction of this character, the communications made to him in course of business are privileged, except in a controversy between the parties themselves: *Warde* v. *Warde*, 2 Macn. & G. 365; *Whiting* v. *Barney*, 30 N. Y. 330; 86 Am. Dec. 385; *Britton* v. *Lorenz*, 45 N. Y. 51; *Rice* v. *Rice*, 14 B.

Mon. 417. It was held, however, in *Britton* v. *Lorenz*, *supra*, that the assignees of one of the parties stood in the place of the assignor, and that, as between them and the other party to the transaction, the communication was not privileged. Whether the plaintiff, as an attaching creditor of Slaughter, attacking the conveyance of the property which was transferred by the bill of sale, is to be deemed as standing in the place of Slaughter, is a question we need not determine in this case. We are of opinion that if Shook acted solely as the attorney of Slaughter in the transaction, the privilege of secrecy did not extend to Harris.

To make the communication privileged as to Harris, he should have been Harris's attorney: *Earle* v. *Grant*, 46 Vt. 113. Upon the question whether he was such attorney or not, the evidence was conflicting, and the inquiry being as to the admissibility of the evidence, it was a matter for the court to determine: *Cleave* v. *Jones*, 21 L. J. Ex. 105; *Hull* v. *Lyon*, 27 Mo. 570; Sharswood's Starkie on Evidence, 700; 1 Greenl. Ev., 14th ed., sec. 49, and notes. Upon a direct conflict of evidence, such as is presented in this case, the decision of the trial judge must be deemed conclusive. The evidence shown by the statement of facts upon this matter makes a still stronger case for appellee. Shook was subsequently corroborated in his version of the transaction by Slaughter, who testified to the effect that he alone employed Shook. The nature of the transaction as testified to by both Shook and Slaughter tends to strengthen their testimony as to Shook's employment. They both testified that Harris paid nothing for the property, and that the transaction was made solely for the protection of such creditors as had just claims against Slaughter. If such were the facts, it is hardly probable that Harris would have gone to the expense of employing counsel to represent him in the transaction.

The instrument under which Harris claimed the property in controversy was an ordinary bill of sale. The plaintiff was permitted to introduce testimony, over the objection of the defendant, to the effect that defendant neither paid nor promised to pay anything for the property, and that the bill of sale was made for the purpose of securing certain of Slaughter's creditors. There are several assignments of error which relate to the court's ruling in admitting this testimony. It is insisted, in support of these assignments, that the evidence was not admissible, because it tended to vary the terms of a

written contract. But it is elementary law that parol evidence is admissible to show that a conveyance absolute upon its face is made upon trusts, or that it was made to hinder, delay, or defraud creditors. But it is further insisted that the testimony was inadmissible, because it did not tend to support the issue tendered by the plaintiff. In his pleadings, plaintiff attacked the bill of sale, upon the ground that it was fraudulent as to Slaughter's creditors, and counsel urge that the evidence tended to show a *bona fide* transfer made in trust for his creditors. It is true that neither Slaughter nor Shook testified that the instrument was made for the purpose of defrauding the creditors of the former. But they did testify to the effect that large claims were brought against Slaughter, which he thought unjust, and which he wished to avoid paying, and that the bill of sale was made to Harris for the purpose of appropriating the property to the payment of such debts as were considered just. If such were the fact, the conveyance, being absolute upon its face, was an assignment upon verbal trusts.

In *Caton* v. *Mosely*, 25 Tex. 375, the court say: "It may be considered well settled that every valid assignment must declare the uses to which the property assigned is to be applied, and must settle the rights of creditors under it, and not leave to the assignee or reserve to the assignor himself the right of subsequently doing so." The testimony clearly tended to support the issues made in the case, and it was not error to admit it. It was shown that Slaughter was insolvent at the date of the bill of sale. This is sufficient to dispose of appellant's assignments from the fourth to the eleventh, inclusive.

We see nothing in the matter complained of in the twelfth assignment of error which could have operated to the prejudice of appellant. In his charge to the jury, in stating the issues, the judge, by evident inadvertence, used this language: "The defendant also denies that Slaughter was a creditor of said Daugherty at the time Slaughter transferred the property to him." The court meant to use the word "debtor" instead of "creditor." It is evident no harm could have resulted from the mistake.

The thirteenth assignment complains of certain portions of the general charge of the court, upon the ground that there was no evidence to support them. The instructions referred to tell the jury, in effect, that if the bill of sale was made with the intent to hinder, delay, or defraud the creditors of Slaugh-

ter, they should find for the plaintiff. From what we have already said in reference to the testimony of Slaughter and Shook, it is apparent there was evidence sufficient to authorize the judge to submit the question of fraud to the jury.

The fourteenth assignment of error is as follows: "The court erred in giving special instructions 1, 2, 3, 4, and 5 asked by plaintiff"; and the fifteenth is: "The court erred in refusing special charges 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 asked by appellant." These assignments are too general to be considered: *Gulf etc. R'y Co.* v. *Redeker*, 67 Tex. 181.

The sixteenth assignment, that "the court erred in refusing to grant defendant a new trial," is also too general.

There being no error in the judgment pointed out by proper assignments, it is affirmed.

ATTACHMENTS AGAINST NON-RESIDENTS. — A personal judgment against a non-resident whose property has been attached within the state is valid, and sufficient to sustain a sale of such property made under such judgment, even though the service of summons was by publication: *Anderson* v. *Goff*, 72 Cal. 65; 1 Am. St. Rep. 34, and note; compare *Mudge* v. *Steinhart*, 78 Cal. 34; 12 Am. St. Rep. 17, and note. But jurisdiction over non-residents upon service by publication results from the fact that they have property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached: *Stone* v. *Myers*, 9 Minn. 303; 86 Am. Dec. 104. In the case of *Cassidy* v. *Woodward*, 77 Iowa, 354, a personal judgment rendered against an absconding and non-resident debtor, served by publication only, in an attachment proceeding, was held to be absolutely void, and the sale thereunder wholly illegal. No attachment will issue in an action for unliquidated damages, and for that reason constructive service, by publication, in such an action, is insufficient for any purpose: *Winfree* v. *Bagley*, 102 N. C. 515.

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS. — Where an attorney has acted for several clients, he cannot testify, without the consent of them all, in a controversy between such clients and third persons; but this rule does not hold good in actions between the parties themselves: *Michael* v. *Foil*, 100 N. C. 178; 6 Am. St. Rep. 577. Conversations between two persons in the presence of an attorney, employed by them to draw a paper, are not privileged: *Goodwin Gas etc. Co.'s Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *House* v. *House*, 61 Mich. 69; 1 Am. St. Rep. 570, and note. And so conversations of two persons submitting a difficulty to an attorney are not privileged: *Cady* v. *Walker*, 62 Mich. 157; 4 Am. St. Rep. 834.

PAPERS OF CLIENT IN ATTORNEY'S POSSESSION. — An attorney having in his possession a letter which passed between litigants may be compelled to produce it: *Harrisburg Car Mfg. Co.* v. *Sloan*, 120 Ind. 156. But an attorney need not produce a writing intrusted to him by his client, or make known its contents, without the client's consent; although he may be compelled to state whether or not he has it in his possession for the purpose of authorizing the adverse party to give parol evidence of its contents: *Stokoe* v. *St. Paul etc. R'y Co.*, 40 Minn. 545.

PAROL TESTIMONY TO VARY A DEED. — In the absence of fraud or mistake, parol testimony cannot vary or contradict the written terms of a deed absolute upon its face: Note to *Finlayson* v. *Finlayson*, 11 Am. St. Rep. 844.

HARMLESS ERRORS IN INSTRUCTIONS. — No reversal can be based upon errors in instructions which are so trifling as not to mislead the jury: *People* v. *Riley*, 75 Cal. 98; *Forman* v. *Commonwealth*, 86 Ky. 605; *Indianapolis etc. R'y Co.* v. *Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Shively* v. *Cedar Rapids etc. R'y Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471; nor for errors in instructions, when such errors are favorable to appellant: *Fahey* v. *State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *Hill* v. *Finegan*, 77 Cal. 267; 11 Am. St. Rep. 279; *People* v. *Clary*, 72 Cal. 59; *Harrington* v. *Sedalia*, 98 Mo. 583; nor for errors in instructions, when such errors work no harm to appellant: *McCurdy* v. *Brown*, 80 Ga. 691; *National Salt Works* v. *Wemyss*, 38 Kan. 482; *State* v. *Price*, 75 Iowa, 243; *Keen* v. *Schmedler*, 92 Mo. 516; *Best* v. *Sinz*, 73 Wis. 243; *McCash* v. *Burlington*, 72 Iowa, 26; *Hanscom* v. *Drullard*, 79 Cal. 235; *Hamburg etc. Co.* v. *Gotham*, 127 Ill. 599; *In re Burrill*, 77 Cal. 479; *People's F. Ins. Co.* v. *Pedoer*, 127 Ill. 247; *In re Moore*, 72 Cal. 325; *Tuskaloosa etc. Mill* v. *Perry*, 86 Ala. 158; *Pigott* v. *Eagle*, 60 Mich. 221; *Low* v. *Warden*, 77 Cal. 94; nor for any errors in instructions, when it is certain to the appellate court that substantial justice has nevertheless been done, regardless of such errors: *Fitzgerald* v. *Barker*, 96 Mo. 661; 9 Am. St. Rep. 375; *Perin* v. *Parker*, 126 Ill. 201; 9 Am. St. Rep. 571.

COTULLA *v.* KERR.

[74 TEXAS, 89.]

LIBEL — PROVINCE OF COURT AND JURY. — In the absence of doubt or ambiguity in the language used, it is the duty of the court to determine and instruct the jury whether or not it is libelous; but when doubt or uncertainty exists, it is the duty of the court to define libel, and leave the jury to determine whether the offense has been proved.

LIBEL OF PUBLIC OFFICER. — It is libelous *per se* to impute to a person in his official character incapacity, or any kind of fraud, dishonesty, or misconduct.

LIBEL OF PUBLIC OFFICER. — To impute to an officer, in his official character, a want of integrity, and charge that he has been induced to act in his official capacity by a pecuniary or valuable consideration, is *prima facie* libelous.

LIBEL OF PUBLIC OFFICER, affecting him personally, is governed by the same rules that apply to an individual; but if it affects him in his official character, and is of such nature that, if true, it would be cause for his removal from office, it is then actionable *per se*. A charge that a county commissioner, in the discharge of the duties of his office, was influenced by a pecuniary consideration, and willfully sat in judgment in matters in which he was personally pecuniarily interested, is libelous *per se*, and the court should so instruct the jury.

LIBEL. — WHETHER OR NOT A PUBLICATION IS PRIVILEGED is a question of law for the court.

LIBEL — CIRCULATING AND PRINTING, WHAT IS. - Every signer of a libelous paper knowing that it is intended to be printed, or who signs and

delivers it to another without knowing that it would be printed, is guilty of circulating and publishing it before it is printed, and if he signs without protest or direction against its being printed, and it is afterwards printed by the person to whom it was delivered, or by his authority, it is no defense for the signer to say that he did not intend nor direct its publication.

LIBEL OF PUBLIC OFFICER IN HIS OFFICIAL CHARACTER may be justified by proving it true, or by showing probable cause and reasonable grounds for believing it to be true.

LIBEL OF PUBLIC OFFICER — MEASURE OF DAMAGES. — Libel of public officer in his official character, not justified by proof of its truth, makes each libeler liable for at least nominal damages, and for such further actual damages as are shown to be the proximate result of the publication, but not for remote or speculative damages, such as loss of financial credit, expense of borrowing money, or other things not connected with his official character, and also liable for exemplary damages if the publication was actuated by malice inferable from the absence of probable cause or from evidence of express malice.

PLEADING AND PRACTICE. — Charge not applicable to nor supported by any evidence should not be given.

Thompson and Gates, for the appellant.

HENRY, A. J. Appellant instituted this suit to recover for the publication of a libel reading as follows:—

"State of Texas, }
County of La Salle. }

"To JOSEPH COTULLA, county commissioner of Precinct No. 1, La Salle County.

"*Sir*,—We, the undersigned tax-payers of Precinct No. 1, whom you were elected to represent, do most earnestly petition that you resign the office of commissioner, and for reason of said request would respectfully submit:—

"1. That your action in reference to public roads is not in accord with our views of what is to the best interest of our precinct. In consequence of which your said action, instead of meeting the approval and approbation of us, the people you pretend to represent, meets the universal and just condemnation that your short-sighted conduct so richly deserves.

"2. Because it is contrary to our system of laws that any man should sit in judgment or pass upon any right, real or imaginary, wherein he may have a pecuniary interest.

"3. Because we have wholly lost confidence in your ability or disposition to represent our wishes, and because we are not willing, as tax-payers, to pay you the enormous sum of ten thousand dollars for the privilege of using for a road a piece of land thirty feet wide by one and three quarters miles long,

running through your pasture, when a jury of your neighbors have fixed the damages at fifty dollars.

"4. Because you have declared an intention to sue the county for said ten thousand dollars damages for a wrong which has no existence (as we consider) save in your distorted imagination.

"5. Because we, being a part of the people constituting the county, and responsible, to a certain extent, for the acts of the commissioners' court, prefer no representation to misrepresentation.

"6. Because your actions show you to be a commissioner for Joe Cotulla only, and not for Precinct No. 1. For many reasons satisfactory to us, among which are the above, you are respectfully urged and earnestly requested to resign."

Attached are the signatures of defendants.

Plaintiff held the office of county commissioner of Precinct No. 1, in La Salle County.

The petition charges that the writing was false and defamatory, and imputed and was intended to convey the meaning that plaintiff had violated his official oath; had corruptly and dishonestly disregarded his obligations as a public officer; had used his official position to further his individual private and pecuniary interests, and had sat in judgment, as one of the county commissioners of La Salle County, in matters in which he had a pecuniary interest, thereby subjecting plaintiff to the ridicule and contempt of all good people; that defendants maliciously circulated the said libel, and published it in the Cotulla Ledger, a newspaper published in said county of La Salle, and also circulated the same from hand to hand, and exhibited it to divers and sundry persons; that the publication of the libel had caused numerous persons with whom plaintiff had previously conducted large business transactions, involving large sums of money, to lose confidence in his honesty and integrity, and caused them to refuse to have further business intercourse with him, to his great damage, and that he had been otherwise greatly degraded, damaged, and injured.

The defendants answered by plea of not guilty, and specially, in substance, that the town of Cotulla was originally located upon land belonging to plaintiff, and was settled at his solicitation by defendants, who engaged in the various branches of business conducted in a town, and invested their means in such business and in the town property; that a road running from the town through plaintiff's land had been used

for all purposes of travel and trade, and was essential and necessary for the convenience and prosperity of the town; that in 1883, plaintiff constructed a fence along the boundary of the town across said road, but placed gates at the points at which the fence intersected the road, through which the public continued a while longer to make use of the road as before; that in August, 1885, plaintiff closed and locked said gates, and forbade and prevented the further use of the road by defendants or the public, thereby stopping the United States mail, and interfering with the trade of defendants, who were mostly merchants, and the other inhabitants of the town of Cotulla, and of Precinct No. 1, of La Salle County; that in this condition of things, the county commissioners' court ordered a review for the purpose of opening a road over plaintiff's said land, and such road was reviewed, and declared a public highway, and plaintiff's damages assessed at fifty dollars, which amount was placed subject to his order; that plaintiff was at the time a member of said court for said precinct, and his constituents had a right to expect him to either resign his office or represent them in opening up this road, but he failed and refused to do either, and instead, he appeared before the said court and asserted a claim for ten thousand dollars damages against the county for opening the road, and threatened that if his claim was not approved, he would enforce its payment through the courts of the country,—the claim being excessive, unconscionable, and unjust.

The plaintiff specially excepted to the sufficiency of the foregoing allegations, and assigns as error the overruling of his exception.

Defendants further pleaded in justification, that they signed said writing because plaintiff, being a member of said county commissioners' court, presented to said court his said claim for damages, contrary to the interests of all the citizens of La Salle County, the claim not being such as the law permitted a member of said court to prefer against the county or to be interested in, by reason of all which they exercised only their constitutional privilege of requesting plaintiff as a member of said court, to resign; that defendants, when signing said writing, intended that it should be handed to plaintiff in person, and its publication in the Cotulla Ledger was without their knowledge and against their wishes. Defendants aver that they had reasonable and probable ground to believe, and did believe, and still believe, that the facts set forth in said writ-

ing were true, and they signed the same without ill-will toward plaintiff, for the purpose of having him resign said office, and they charge "that it is true that plaintiff while county commissioner sat in judgment upon his own claim against the county of La Salle."

In so far as these pleadings set up the truth of the charge, that plaintiff acted as county commissioner in a proceeding in which he had a personal interest, the exceptions were properly overruled. The exceptions to other matters contained in said pleadings, and particularly so much as are referred to in appellant's sixth assignment of error, should have been sustained.

It is complained that the court left the jury to decide what the alleged libelous statements really mean, or how the publication was calculated to be understood by those who might see it, instead of instructing them that the publication was libelous *per se*, and that they must find for plaintiff at least nominal damages.

In the absence of doubt or ambiguity growing out of the language used in the publication, we understand it to be the duty of the court to determine and instruct the jury whether or not it is libelous, but where there is uncertainty or doubt, it is the duty of the court to give the jury a definition of what is a libel, and leave it for the jury to say whether the offense has been proved: 4 Wait's Actions and Defenses, 292; *Pittock* v. O'*Neill*, 63 Pa. St. 253; 3 Am. Rep. 544.

The general rule is stated to be, that it is libelous *per se* to impute to a person in his official character incapacity, or any kind of fraud, dishonesty, or misconduct, if it be shown that the publication had reference to the office. So it has been held that imputing to an officer in his official character a want of integrity, and charging that he had been induced to act in his official capacity by a pecuniary or valuable consideration, is *prima facie* libelous: 4 Wait's Actions and Defenses, 285.

When the publication admits of no just interpretation, except one which is injurious, its meaning is to be determined by the court: Townshend on Slander and Libel, 528.

When a libelous publication relates to a person in office, it may affect him in his personal or official character. If it relates to him personally alone, it is governed by the same rules that apply to an individual. If it applies to him as an officer, the better opinion seems to be that, to make it actionable *per se*, the charge must be of such a nature that, if true, it would

be cause for his removal from office: Id., 211, 212; *Robbins* v. *Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152.

We think, under our statutes, a county commissioner who in the discharge of the duties of his office is influenced by a pecuniary consideration, or who willfully sits in judgment in a matter in which he is personally and privately pecuniarily interested, thereby renders himself liable to be removed from office for official misconduct.

We do not think the publication on which this suit is founded contains any libelous matter, unless it is found in the second and sixth paragraphs. These two paragraphs, taken together, are not of such doubtful or uncertain meaning as to require their submission to a jury to ascertain whether or not they are libelous.

We think it clear that they were intended to be understood as charging that plaintiff in his official character had been improperly and corruptly influenced by pecuniary considerations, and had willfully acted and voted as a county commissioner when his private interests were involved, and had represented his own interest instead of discharging his duty to the public.

It was the duty of the court to charge that the publication was libelous, instead of leaving that fact for the jury to find from the evidence.

Whether a publication is privileged or not, is a question of law for the court, and in this case the judge should have instructed the jury that the publication in question was not privileged.

Whether or not defendants were guilty of circulating and publishing the libel, and whether they acted maliciously, were questions for the jury under proper instructions.

Plaintiff's petition charges that it was published in a newspaper, and circulated from hand to hand, and as there was evidence on that issue, it was proper for the court to charge that each and every defendant who signed the paper knowing it was intended to be printed, or who signed it and delivered it to another without knowing it would be printed, would be guilty of circulating it. Signing a libelous paper when it is being carried around to procure signatures, and delivering it when signed to the carrier or another person, is itself a publication of it before it is printed; and if no protest or direction against its being printed is made by the signer, and it is afterwards printed by the person to whom it is delivered, or by

such person's authority, it is no defense for the signer to say that he did not intend or direct its publication.

There can be but one lawful defense made in this case, if plaintiff shall establish (as he must do before he can recover any damages) that defendants signed and published the libel, and that is, that it is true. What must be shown to be true is, that plaintiff, as a county commissioner, did sit in judgment in a matter wherein he had a pecuniary interest, and did willfully act and decide in favor of his personal interest, instead of in accordance with his duty to the public.

If defendants, or any of them, are shown by the evidence to have signed and published the libel, and do not so justify themselves by proving its truth, they are liable, and the jury should be instructed to return against them a verdict for at least nominal damages, and for such further actual damages as the evidence may show to be the proximate result from the publication, but not for remote or speculative damages, such as the loss of financial credit, the expense of borrowing money, or other things having no connection with his official character.

The jury should be instructed that they may, in addition to actual, assess against defendants exemplary, damages, if they find plaintiff entitled to recover, and find further, that defendants, in making the publication, were actuated by malice; and that they may infer the existence of malice from absence of probable cause for making the publication, or upon evidence of express malice.

The existence of probable cause must be confined, in this case, to reasonable grounds for believing that plaintiff did sit, as above explained, in judgment in some matter in which he had a pecuniary interest, and acted in behalf of that interest instead of with reference to the discharge of his public duties.

At the request of defendants, the court gave the following charge: "If you believe, from the evidence, that defendants were residents of Precinct No. 1, La Salle County, and that the plaintiff was the duly elected and qualified county commissioner of Precinct No. 1 of said county, and that a public road was necessary leading west to Zavala and Dimmit counties over the adjoining land of plaintiff, and that they had reasonable and probable grounds to believe that the petition described as a libel in this case was true, and that they signed the same without any malice whatever towards the plaintiff,

and that the same was published in the Cotulla Ledger without the knowledge or consent, and against the wishes, of all the defendants (except Bowen), then and in that case you are instructed that you find in favor of the defendants (except Bowen), and against the plaintiff."

Given with the following qualifications as to the law: "1. That whether the plaintiff consented or not to the opening of the road or roads would afford no justification or excuse for the defendants to publish a libel on the plaintiff, as explained in the general charge of the court, if they did do this. 2. To constitute probable cause for believing the charges true, it must be shown that the defendants made due inquiries and used proper diligence to ascertain the truth or falsity of the statement as well as the purpose for which it was intended to be used,—that is, such diligence or inquiries as an ordinarily prudent man would have used in his own business affairs under like circumstances. 3. If, therefore, any of the defendants recklessly signed or circulated the libel, or if they saw its publication in the Cotulla Ledger, and were made aware of its contents and publication, and thereupon failed to publish a retraction of the same, then such defendants would be responsible for its publication or circulation."

The charge as requested contains matter that furnishes no defense, and was improperly given, either with or without the qualifications added by the court.

In some other particulars, the charge contains correct abstract propositions; but they, not being applicable to the proof, or supported by any evidence, should not be given to the jury.

In whatever manner such matters as the necessity for a public road over plaintiff's land, or his suing or threatening to institute or prosecute a suit against the county for damages, present themselves in the progress of this cause, they should be eliminated, as they can have no tendency toward a correct solution of the questions properly in issue.

The judgment is reversed, and cause remanded.

LIBEL, WHEN A QUESTION OF LAW for the court to determine, and when a question of fact for the jury: *Hayes* v. *Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and particularly cases in note; note to *State* v. *Syphrett*, 13 Id. 625-627.

NEWSPAPER LIBEL: See extended note to *McAllister* v. *Detroit Free Press*, *ante*, pp. 332 et seq.

LIBEL. — The reputation of an officer cannot be destroyed or damaged, by the publication of false imputations upon his morality or honesty, without redress: *Bourreseau* v. *Detroit Evening J. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320.

COMMENTS UPON OFFICERS AND CANDIDATES FOR OFFICE: *Jones* v. *Townsend's Adm'x*, 21 Fla. 431; 58 Am. Rep. 676, and particularly note 685–692.

INSTRUCTIONS. — Although abstractly correct, instructions should not be given when they are not applicable to any phase or theory of the case as developed by the evidence: *Evansville etc. R. R. Co.* v. *Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458.

ADAMS AND WICKES *v.* ODOM.

[74 TEXAS, 206.]

JUDGMENTS — EFFECT OF REVERSAL — SUBSEQUENT PURCHASER. — When a judgment foreclosing a mortgage, and directing the sale of certain lands named in the mortgage, and also of certain substituted lands not mentioned therein, is reversed as to the sale of the substituted lands, the effect of such reversal is to destroy the title to such lands acquired by the mortgagee at a sale made before such reversal, under process issued only to carry out the judgment of foreclosure. Therefore, a purchaser from the mortgagee subsequent to the reversal acquires no title to such lands.

Simpson and James, for the appellants.

S. B. Easley, Tarleton and Keller, and Denman and Franklin, for the appellee.

STAYTON, C. J. The parties to this appeal have made an agreed case, under rule 59, and caused same with brief to be printed, which entitles it to precedence.

The two tracts of land in controversy belonged to Henry Castro on and prior to June 30, 1852, and so continued until after December 24, 1854, unless his title was divested by proceedings between those dates, which will be hereafter stated.

Prior to June 30, 1852, John H. Illies was prosecuting, in the district court for Bexar County, a suit against Henry Castro, in which he sought to recover a debt due to him by Castro, and to foreclose two mortgages held by him to secure it. All the lands on which Illies might foreclose were situated in Medina County. The two tracts in controversy and many others on which Illies might foreclose were not embraced in either of the mortgages, but he claimed that they should be substituted for lands so embraced in pursuance of a verbal agreement which he claimed had been made between himself and Castro.

On June 30, 1852, a judgment was rendered in favor of

Illies for $20,228, with foreclosure of mortgage as asked by him. That judgment stated what lands were covered by the mortgages, and what lands were substituted, and directed the sale of all in so far as necessary to discharge the judgment in favor of Illies. The judgment then proceeded as follows: "And it is further ordered, adjudged, and decreed by the court that in case the proceeds of the sale of the foregoing lands should prove insufficient to pay the amount of this judgment, with interest and costs on the sum of $12,500 principal, and the further sum of $5,228.43 interest on said debt until paid, and also the further sum of $2,500 and costs, without interest, on the sum of $2,500, with stay of execution on the sum of $6,000, until the defendant Illies shall have filed a bond in the sum of $9,000, with approved security, or shall have filed such a release or evidence of the payment or cancellation of the drafts for fourteen and sixteen thousand francs, as alluded to in the parties' pleading, said stay of execution shall continue to exist until such bond or release are approved by the judge, and filed in the district clerk's office of Bexar County; then that execution shall issue against all the goods, chattels, lands, and tenements of said Castro to pay and satisfy the balance which may remain due and unpaid; and that this judgment operate as a general lien upon all the real property and slaves of said Castro, situated in the county of Medina, from the date of its registration in said county and in the county of Bexar from the date hereof. And it is further ordered, adjudged, and decreed that the said John H. Illies do recover of said Henry Castro his reasonable costs in this behalf expended."

On June 8, 1853, a writ was issued from the district court of Bexar County, directed to the sheriff of Medina County, which contained a full description of the several tracts of land on which mortgage had been declared and foreclosure decreed, which, except as to the description of lands thereby directed to be sold, was as follows:—

"State of Texas,
County of Bexar.

"To the sheriff of Medina County, greeting.

Whereas, John H. Illies, on the twenty-fifth day of June, A. D. 1852, at our district court hath recovered against Henry Castro, of Castroville, in Medina County, the sum of $17,728.43, with interest thereon from the said twenty-fifth day of June, 1852, until paid, and also the further sum of $2,500, and costs of suit; and whereas, by said judgment there was a decree of

foreclosure of mortgage on the following lands belonging to said Henry Castro, to wit: . . . .

"These are therefore to command you that of the mortgaged lands above set forth and described you proceed to sell a sufficient quantity to pay the full amount of this execution, together with your legal fees and commissions for collecting the aforesaid amount, and that you have this writ at the clerk's office of said court on or before the return day hereof, certifying how you have executed the same.

"Witness, John M. Carolan, clerk of district court, and seal of said court, at San Antonio, this eighth day of June, A. D. 1853. "J. M. CAROLAN,

"Clerk District Court, Bexar County.

"By THO. WARD, Deputy."

In pursuance of this writ the lands were all sold by the sheriff of Medina County on July 5, 1853, under a recited levy, of date June 10, 1853.

Whether Illies bought all the lands described in the judgment and writ is not made to appear by the agreed statement, but he bought the lands in controversy, for which he bid $130.

The entire amount of sales was $3,695.40, for which Illies receipted to the sheriff on July 11, 1853. The judgment was recorded in Medina County some time in the month of July, 1853, whether before or after the sale made by the sheriff does not appear.

The sheriff made a deed to Illies, and after the return of the writ under which the sales were made, an execution issued, on which was credited the sum realized on the sale.

Within two years, but after the sales referred to were made, Castro prosecuted a writ of error without *supersedeas* bond, on which this court rendered the following judgment:—

"THURSDAY, December 24, 1854.

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, it is ordered, adjudged, and decreed that the judgment of the court below be modified and rendered here; and this court proceeding to render such judgment as the court below should have rendered, it is ordered, adjudged, and decreed that the judgment and decree of the court below, so far as it relates to the sum due to Illies and his cost, be affirmed; and it is further ordered, adjudged, and decreed that so much of the decree of the court below as decrees the sale of the specific land described in the two deeds of conveyance to Illies and Wurz-

bach in satisfaction of the money decreed to be due to Illies, as far as it goes, be affirmed; it is also affirmed so far as it directs execution in favor of Illies for any balance remaining due to him after the sale of the land specified in the mortgage deeds; and it is further ordered, adjudged, and decreed that so much of the judgment of the court below as directs the sale of lands not described in the deeds of mortgage but substituted in lieu of a part of the lands so described be and the same is reversed. And it is further ordered, adjudged, and decreed that so much of the decree of the court below as directs a lien on other lands belonging to Castro, the plaintiff in error, not included in the mortgage deeds, be reversed, annulled, and held for naught; and it is further ordered that the defendant in error recover of the plaintiff in error his costs in this court as well as in the court below expended, and this decision be certified below for observance": *Castro* v. *Illies*, 13 Tex. 229.

Neither Illies nor Castro conveyed this land until long after the judgment by the supreme court.

Appellants claim the land in controversy by mesne conveyances under Castro since the supreme court decree, and appellee under Illies since said date. Appellee is in possession.

The agreement as to the question of law to be decided, and of other facts on which to base a decree, is: "Did John H. Illies acquire title to the two surveys Nos. 131 and 132, district No. 1, in controversy, by virtue of the deed from the sheriff of Medina County to said Illies under the judgment, record thereof, and sale as shown? If so, this judgment may be affirmed. If not, this judgment may be reversed, and rendered for appellants for the land in controversy, and the rental value of said surveys (320 acres) at five cents per acre per annum from March 29, 1884, and allowing appellee the value of improvements in good faith thereon in the sum of two hundred dollars, and fixing the value of the land at two dollars per acre."

If the judgment in favor of Illies had been reversed *in toto* under the rule followed in this state, which seems to be generally adopted, there could be but little controversy as to the rights of the parties.

The general question as to the effect of reversal of a judgment after property has been sold under it and bought by the person in whose favor the judgment was originally rendered was considered in *Stroud* v. *Casey*, 25 Tex. 755, and it was

said "the consequence is, that the reversal of the judgment put an end to the title": Freeman on Judgments, 481, 482.

To the same effect are the following cases: *Marks* v. *Cowles*, 61 Ala. 302; *Delano* v. *Wilde*, 11 Gray, 17; 71 Am. Dec. 687; *Gott* v. *Powell*, 41 Mo. 420; *Reynolds* v. *Harris*, 14 Cal. 678; 76 Am. Dec. 459; *Hubbell* v. *Broadwell*, 8 Ohio, 127; *Bryant* v. *Fairfield*, 51 Me. 159; *Galpin* v. *Page*, 18 Wall. 373.

It would seem to be a useless formality to institute proceedings to have declared the purchaser's claim invalid, when the effect of the reversal is to declare invalid the proceedings through which such a purchaser sought to acquire title.

It was suggested in *Reynolds* v. *Hosmer*, 45 Cal. 629, that the owner, after reversal, may, at his election, either have the sale set aside, and be restored to possession, or have his action for damages.

We do not understand that the court intended in that case to hold that in such a case it was necessary for the owner after reversal to take any steps to avoid a sale; for in that case an application was made in the circuit court to set aside a sale on reversal of the judgment under which it was made, which was refused, and it was contended that this was an adjudication that the sale was valid; but the supreme court said: "We do not think so. When the supreme court reversed the judgment of the circuit court, and adjudged that the plaintiff had no lien on a portion of the canal, and its mandate was filed in the lower court showing these facts, the judgment was reversed, whether the lower court made any order conforming its judgment to that of the supreme court or not. If the plaintiffs have any rights here, they come from the reversal by the supreme court, and not from any subsequent action or want of action by the circuit court."

In that case, the owner of property sold before reversal brought suit for damages, and not for the land sold, and in such a case it may be that the owner ought to be held to have ratified the sale and the power of the officer who made it.

The judgment establishing the sum due to Illies having been affirmed, it is contended that the judgment was in so far valid, and that the process issued under it conferred lawful power on the sheriff to make the sale.

It is further contended that the objections raised to the validity of the sale amount at most only to irregularities. The court rendering the judgment having jurisdiction of the parties and subject-matter, a sale made to a stranger before

reversal under the process issued would have passed title not subject to be defeated by subsequent reversal.

As between Castro and Illies, however, the process issued could confer on the officer who made the sale no power other than such as the judgment gave, and the extent and character of this, as between them, must depend on their rights as ascertained and declared by the judgment rendered in this court on writ of error. That judgment, in effect, declared that the land in controversy could not legally be sold on such process as was issued and executed.

The statutes in force at the time provided what the judgment or decree for the foreclosure of a mortgage should be, as well as for the further procedure, and the judgment and process issued under it were such as were appropriate for the enforcement of a specific lien: Paschal's Dig., art. 1480.

That statute required the judgment to direct an order of sale to issue to the sheriff, directing him to sell the mortgaged property; and it was only in the event that the same could not be found or should not sell for a sum sufficient to pay the judgment and costs that process was authorized to issue under which other property might be seized and sold to satisfy the judgment.

If the writ under which the land in controversy was sold had contained a command to the sheriff in the event the mortgaged property did not sell for enough to satisfy the judgment and costs, then to levy upon and sell other property sufficient for that purpose, it might be held that the sale was valid, and the issuance of such process before the mortgaged property was sold and found insufficient only an irregularity. The process, however, contained no such demand, but required the sale of the property in controversy absolutely, if necessary, to satisfy the judgment; and this cut off the right of Castro to point out other property, as he would have been entitled to do under the law, after the property really mortgaged had been sold and found insufficient: Paschal's Dig., art. 3775.

It is said: "If the land in controversy, and in fact all said substituted lands, had been sold under an ordinary execution directing the sheriff to sell any and all lands of Castro to satisfy said judgment, instead of under said writ directing sale of the lands therein described, the sale would have passed title to Illies."

If this proposition be conceded, and if it could be admitted that under a judgment foreclosing a mortgage, and directing

the specific property to be sold for its satisfaction, an ordinary execution could be issued, levied, and property sold under it before a sale of the mortgaged property, this would not relieve appellee from the difficulty that meets her.

The officer had no such writ, and could only do that under the process held by him which it commanded, had the judgment under which it issued been entirely lawful.

In *Maupin* v. *Emmons*, 47 Mo. 308, it appears that under the statutes of Missouri, as in many of the other states, when a *fieri facias* has been levied, but returned without sale, a *venditioni exponas* may issue directing the sale of the property levied on, and in the event that be deemed not sufficient to satisfy the judgment, commanding the sheriff to seize and sell other property.

A writ issued directing the sale of property seized under the writ returned, but omitting the command to seize and sell other property in the event the officer deemed the former levy insufficient. The former levy did not embrace a tract of land, but the sheriff under the last writ levied upon it and sold; and in a contest growing out of this, it was claimed that the sheriff was clothed with the same power as though the command to make an additional levy, if necessary, had been inserted in the writ. The court, however, said: "This proposition runs counter to all our ideas of the powers and duties of sheriffs. It has always been considered that he was but the executive officer of the court, bound to obey its lawful commands, and in executing a writ, that he must look to the face of it for the extent and boundary of his duties and his powers. It does not matter what writ might have been issued,—to what writ the party was entitled by law if he had chosen to sue it out; when it is issued, and placed in the officer's hands, his only duty is to see what are its commands, and if he finds them within the authority of the court, he must obey them. But he cannot go beyond those commands or question their regularity. If he is ordered to sell certain property, the owner gives him no authority to seize and sell other property": *Quinn* v. *Wiswall*, 7 Ala. 645; *Cannaday* v. *Nuttall*, 2 Ired. Eq. 265; *Allemong* v. *Allison*, 1 Hawks, 325; *Dunn* v. *Nichols*, 63 N. C. 109.

In *Reynolds* v. *Harris*, 14 Cal. 678, 76 Am. Dec. 459, it appeared that a court having jurisdiction of the parties and subject-matter entered a judgment foreclosing mortgages, into which entered an improper order as to the manner of sale in

foreclosure. A question arising as to the validity of a sale made under the judgment before its reversal, it was held that the reversal destroyed the title acquired by an assignee of the judgment who purchased under it; and in disposing of the question it was said: "We see no difference between the total reversal of the judgment in that case, so far as this question is concerned, and a partial reversal; for the effect of the reversal was to declare that this sale, as ordered by the decree of the court below, was improperly so ordered, and that the sale should have been made by the law of the land in a different manner in substance and in fact."

Before the reversal of the judgment obtained by Illies, the sales made under the process issued not having realized a sum sufficient to satisfy it, execution issued and was levied on other property of Castro, which was sold, and in a controversy as to that it was claimed that the sale under execution was invalid on the ground that the mortgaged property had not been first sold, and on the further ground that the reversal of the judgment vacated all sales made under it.

In disposing of that case it was held "that all the mortgaged lands included in the decree, and all which by the judgment of this court were subject to seizure and sale under the decree, were first sold. The judgment was not superseded upon prosecuting the writ of error. It was therefore an authority for the issuance of execution, and it cannot affect the title of the purchaser at the sale that property was not sold under the decree to which the defendant in execution had no title, and upon which the decree could not legally operate, or which was not legally subject to seizure and sale on execution under the decree": *Castro* v. *Illies*, 22 Tex. 496; 73 Am. Dec. 227.

The facts on which the rights of the parties to this action depend were before this court when the decision in the case last referred to was made, and we have in it a recognition of the fact that the property in controversy was not subject to seizure and sale under the decree of foreclosure, although it would have been on execution issued on the general judgment for money.

No right existed under the judgment to have any particular land sold other than such as was contained in the mortgages, and the judgment of this court which declared this swept away all claim of Illies founded on the sale made under process issued only to carry out the decree of foreclosure.

After reversal, so much of the decree as directed the sale of land not embraced in the mortgages as between the parties to it, was as though it had never been entered, and process issued under it as between such parties and these claiming through them by conveyance made after reversal cannot stand on other ground than does the decree.

It is urged that Illies acquired a lien on the land, and that for this reason sale made under the process issued should be sustained. That no lien was given by the decree was decided (*Castro* v. *Illies*, 13 Tex. 236), and that none was acquired by registration of the judgment is clear. Had a lien been acquired in either of these ways, we do not see that this would in any manner affect the question involved in this case.

No facts are shown which would operate as an estoppel between Castro and Illies or between their vendees.

The judgment of the court below will be reversed, and here rendered for appellants, in accordance with the agreement of the parties.

JUDGMENTS REVERSED. — As to the effect of the reversal of a judgment of foreclosure, when a sale has been made thereunder: *Withers* v. *Jacks*, 79 Cal. 297; 12 Am. St. Rep. 143.

WESTERN UNION TELEGRAPH COMPANY *v.* EDSALL.

[74 TEXAS, 329.]

TELEGRAPH COMPANY — LIABILITY FOR DELIVERY OF CHANGED MESSAGE. — A telegraph company, with notice of the purpose for which a message is sent, is liable to the sender for all damages and expense naturally and proximately resulting from its negligence in delivering the message in a changed condition.

TELEGRAPH COMPANY — NOTICE OF PURPOSE OF TELEGRAM. — When a telegraph company is given notice of the main purpose for which a telegram is sent, it is chargeable with notice of whatever the dispatch suggests, and of every incidental fact attending the transaction which it could have ascertained by the most minute inquiry; and if, under such circumstances, it delivers a changed telegram, it is liable for all damages naturally resulting from its negligence in failing to make such inquiries.

TELEGRAPH COMPANY. — NEGLIGENCE OF TELEGRAPH COMPANY in delivering a changed telegram cannot be attributed to the receiver thereof, who acts upon its direction, when there is nothing in the message as received to suggest a doubt as to its accuracy.

APPEAL from a judgment in favor of Edsall for $3,560.

Stemmons and Field, for the appellant.

Potter and Hughes, for the appellee.

HENRY, A. J. This suit was brought by appellee to recover damages for the negligent transmission of a telegraph message by appellant.

The message directed to be sent read: "Meet me immediately with two horses at Buffalo Springs. Bring Shep." As delivered it read: "Meet me immediately with two horses at Buffalo Springs. Bring sheep."

The message was sent from Gainesville, Texas, to Fort Griffin, Texas, and from there mailed to Throckmorton, Texas.

The plaintiff then owned and had on his ranch in Throckmorton County, a flock of two thousand five hundred head of sheep. He had just purchased a flock of about thirteen hundred head in Cooke County which he proposed to drive to his ranch in Throckmorton County. The message was sent on the twentieth day of January to one Joel Butler, who was the servant of plaintiff in charge of his sheep in Throckmorton County. Shep was a dog belonging to plaintiff, and in charge of Butler, trained in the management of sheep. The purpose of the dispatch was to have Butler meet plaintiff on the way between Cooke County and Throckmorton County, in order that he might have his assistance, and that of the dog, in driving the purchased sheep (known as the West flock) to his ranch.

On account of the error in the dispatch as delivered to Butler, "sheep" instead "Shep," Butler at once drove the Throckmorton or ranch flock of sheep to Buffalo Springs.

It is charged that the consequences of the mistake occasioned damage to both flocks, and additional expense.

That by reason of the greatly longer time required for Butler to reach Buffalo Springs with the sheep than it would have done with the dog, plaintiff was prevented from making connection or communicating with him, and for the want of his assistance and that of the dog, he was greatly delayed in driving the West sheep, and put to great additional expense, and that the longer exposure of the sheep, and the more inclement weather on the last part of the route,—that from Buffalo Springs to the ranch,—the West sheep perished in great numbers; and that by reason of the ranch sheep being taken from their range, where they were well provided for, and driven to Buffalo Springs, over a barren country, where they could not get feed, and were exposed to inclement weather, they perished in large numbers; and besides, those of both flocks that survived were greatly injured and lessened in value; and that

the dog would have greatly lessened the number of hands required, and at the same time have enabled plaintiff to complete the drive in a shorter time.

Judgment was rendered for plaintiff.

Appellant complains of errors committed by the district court in not sustaining its exceptions to plaintiff's pleadings, on the grounds, — 1. Because they failed to charge that defendant had any notice of the object and purpose for which the telegram was sent further than shown by the telegram, and by it there was no notice that the damages sued for would follow a breach of the contract in transmitting and delivering the telegram; 2. Because they show on their face that in acting on the message as delivered there was such contributory negligence on the part of plaintiff's agent as precludes a recovery; 3. Because they do not show that defendant had any notice that plaintiff owned any sheep in Throckmorton County; that the dispatch did not give such notice, and no damages from that cause were in the contemplation of the parties when they made the contract; 4. Because the item of one hundred dollars damages, or expense of driving sheep to and from the ranch to Buffalo Springs, is not an element of damage, because it was not in contemplation of the parties at the time the message was accepted for transmission.

Plaintiff alleges in his petition that when the dispatch was sent "he informed the agent of defendant who was then in its office and in charge thereof, that he wanted to telegraph to Joel Butler, requesting him to bring the dog, and meet him to assist in driving the sheep purchased by him in Cooke County to his ranch in Throckmorton County."

This allegation shows that direct notice was furnished defendant that the object of the dispatch was to get assistance for the purpose of driving sheep on part of the journey from Cooke County to Throckmorton County, and the telegram as delivered directing that the ranch sheep should be taken to Buffalo Springs, there cannot be a question of want of notice in either case. When notice of the main fact was given, we think the defendant was chargeable with notice of every incidental fact that would attend the transactions that it could then have ascertained by the most minute inquiry. Notice of the main purpose was sufficient to put it upon inquiry as to the attendant details, and it is chargeable with all it could have learned by such inquiries. This rule, enforced in all cases, is emphatically applicable to telegraph companies.

The condensed methods of expression in use in their business require them to take notice of whatever the dispatch suggests; and if they need fuller information on the subject, they should seek it, and if they do not do so they must be held, as we have suggested, to have all the knowledge that such inquiries could have elicited. In this case, knowledge of the fact that the two herds were to be driven between known points at a stated season of the year would probably charge the company sufficiently with notice of the distances, character of the country, expense of driving, and effect of delay on the sheep, considering the weather and other things incident to driving flocks of sheep over the routes, to make it responsible for damages growing out of such causes or conditions.

We are unable to see in what consisted negligence on the part of Butler, the servant of plaintiff, in obeying a plain command to him to take the flock of sheep to Buffalo Springs. The dispatch contained no word inconsistent with that direction. It contained nothing to suggest a doubt of its entire accuracy. If he had entertained such a doubt, he had no means of removing it. The dispatch had been brought to him by mail from the end of the telegraph line, and not having the means of immediately communicating with the sender, if that could have been required of him under any circumstances, he was under the necessity either of obeying or repudiating it. We do not think it can be fairly contended that, under the circumstances, it was not his duty to obey the message as he did.

Appellant complains that the court erred in its charges to the jury as follows: 1. In failing to submit to the jury the question of notice to defendant of any object to be accomplished by the telegram further than shown by itself, and as to whether damages to the sheep were in contemplation of defendant when it received the telegram for transmission; and in failing to submit the question of contributory negligence; 2. In charging that plaintiff might recover for loss on the West flock between Buffalo Springs and plaintiff's ranch, because all the evidence showed that Butler reached said destination before plaintiff did, and plaintiff's loss was occasioned by his failing to meet Butler there.

In the main, these objections are the same as those raised upon the exceptions to the pleadings, and have no more merit in one view than in the other. Moreover, in so far as they complain of the omission to give charges, those given by the

court being found unexceptional, the omitted charges, even if they had been correct, ought to have been brought to the attention of the court.

With regard to the objection to the charge as to damages for driving the sheep between Buffalo Springs and the ranch, based upon the evidence that Butler arrived at the springs before plaintiff did, and that plaintiff not finding him there at all was his own fault, we think that on this point the evidence shows that plaintiff sent a messenger to meet Butler at Buffalo Springs and give him further instructions consistent with the original purpose, but on account of Butler being impeded by the ranch sheep, which he was driving, he was greatly delayed, leading to the messenger leaving the destination before he reached it. From the same cause, Butler, when he arrived at the destination, could get no information, and as for the want of food and shelter, the sheep under his control were being greatly injured, he, after waiting there a short time, prudently returned with the sheep to the ranch, from which it resulted that he was not at Buffalo Springs when plaintiff reached that point with the other flock, and no communication was established between the two until afterwards.

As the record now stands, owing to portions of it having been stricken out on motion of appellee, there is nothing to support the remaining assignments of error discussed in the brief of appellant.

We think the judgment ought to be affirmed.

TELEGRAPH COMPANIES. — AS TO THE LIABILITY OF A TELEGRAPH COMPANY for failing to send or deliver messages, or for errors therein, see extended note to *Western Union Tel. Co.* v. *Cooper*, 10 Am. St. Rep. 778–790; compare *Western Union Tel. Co.* v. *Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630, and note; *Pepper* v. *Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and note; *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Alexander* v. *Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556.

CITY OF FORT WORTH v. CRAWFORD.

[74 TEXAS, 404.]

NUISANCE — LIABILITY OF CITY FOR MAINTAINING. — A city having control and possession of a dump-yard and burying-ground so negligently and carelessly kept as to constitute a nuisance is liable in damages to an adjoining land-owner injured thereby.

NUISANCE — SUFFICIENCY OF PETITION AGAINST. — A petition in an action against a city for creating and maintaining a nuisance containing the necessary averments, and alleging that plaintiff's home was free of all noxious and offensive odors, and was a desirous and healthy abode prior to the time defendant committed and permitted the nuisances complained of, describing them, is sufficient, without direct averment to negative the supposition that the sickness and injury to plaintiff and his family were caused by other than the ground constituting the foundation of the action.

NUISANCE — LIABILITY OF CITY FOR MAINTAINING. — In an action against a city for creating and maintaining a nuisance, it is not necessary to plead the character and nature of its possession; and if the proof shows a maintenance of the nuisance while in the possession and control of the city, its liability attaches, no matter how it obtained possession.

NUISANCE. — EVERY PERSON HAS THE RIGHT to have the air diffused over his premises free from noxious vapors and noisome smells that would not exist there except for the acts of the party complained of, and which are prejudicial to health, or nauseous to the smell, or trench upon the rights of the person affected thereby, but they must be of such character as to be offensive to the senses or to produce actual physical discomfort, naturally interfering with the comfortable enjoyment of property, though they need not be hurtful or unwholesome.

NUISANCE — LIABILITY OF CITY FOR MAINTAINING. — When a municipal corporation has ample power to remove a nuisance injurious to health, endangering the safety or impairing the convenience of its citizens, or when in the prosecution of a public work it creates or maintains a nuisance, it is liable for all the injuries resulting from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its unlawful acts.

APPEAL from a judgment of $750 in favor of Crawford.

Capps and Cantey, for the appellant.

A. M. Carter, for the appellee.

HOBBY, J. Upon the former appeal in this cause, the judgment was reversed on the ground that the court failed, in its charge, to submit the proper test as to the appellant's liability, which was held to depend upon its negligence with respect to the deposit of and burial of the bodies of dead animals, garbage, filth, etc., upon the land adjacent to appellee's home, and which resulted in the injury complained of: *City of Fort Worth* v. *Crawford*, 64 Tex. 202; 53 Am. Rep. 753.

The petition in this case was excepted to on the ground that it did not allege with sufficient certainty that the sickness and suffering and injuries to plaintiff and his family were occasioned from no other cause than the acts of defendant, and did not allege that the city had taken possession or assumed control of the ground on which the deposit of filth-garbage, and dead bodies of animals were made by proper ordinance or vote of its council, or that the city was acting in the scope of its authority, if it had so taken possession. These exceptions were overruled, and this action of the court is assigned as error.

The petition alleged the due incorporation of the city of Fort Worth, the ownership and possession in 1881, and ever since, by the plaintiff of seventeen and one half acres of land near the city of Fort Worth, to the east, which was the home of the plaintiff, his wife, and children, "of which latter he had several"; that it had been his home for a long time prior to said date (1881); that it was free from all noxious and offensive odors, and was a healthy abode for the plaintiff and his family; that in 1881, the defendant was in possession of ten acres of land in the city limits, and close by the plaintiff's premises; that from some time in 1881, the defendant had continually "wrongfully, negligently, and unjustly cast, carried, and deposited, and caused and carelessly and negligently permitted to be cast, carried, and deposited, on said ten acres of land in its possession, great quantities of filth and refuse matter from privies, water-closets, stables, sinks, and streets, and carcasses, and other noxious things too filthy to name or write in a petition"; that the defendant failed and neglected to take reasonable and proper action to prevent said deposits from poisoning the air, and so injuring the health of plaintiff and his family, and ruining his said premises; that had the defendant taken reasonable and proper steps, and acted in the premises in a reasonable and proper manner, "as it could and should have done," the injuries to plaintiff and his family would not have occurred; that on account of the sickness of the plaintiff's family, caused by said noxious odors, he was compelled to spend one hundred dollars for medicines, and paid doctors one hundred dollars; that on account of said sickness, he and his wife lost a great amount of time, valued at two hundred dollars; that the value of the nursing of his family during said sickness was one hundred dollars.

It was not necessary for the petition, by direct averment, to negative the supposition that the sickness and injury to himself and family were occasioned by other causes than those constituting the foundation of the suit. This was necessarily implied from the allegation that his home, for a long time prior to 1881, had been free from all noxious and offensive odors, and was a healthy abode; that the acts of the defendant were the direct cause of the injury is sufficiently stated in the averments to the effect that his "was a desirous and healthy home for plaintiff and his family prior to the time the defendant committed and permitted the nuisances hereinafter complained of," etc., coupled with and followed by the allegations quoted, describing the nuisances.

It is also distinctly averred that "in 1881, the defendant was in possession of ten acres of land in the city limits, and close by plaintiff's premises." If the fact of the nuisance created and maintained by it was established by proof while in its possession and control, its liability would attach, and whether the city took possession by an ordinance or by vote of the council would be a matter of evidence, and it would not in such a case be essential to plead the character or nature of its possession.

The refusal of the court to give the following instruction is complained of: "You are instructed that you are to find for the defendant, unless you find, from the evidence, that the injuries arising from inhaling the noxious gases and effluvia complained of by plaintiff were the direct and immediate cause of the negligence of defendant's duly authorized agents, acting within the scope of their authority."

The court instructed the jury: "That if you believe that the agents and employees of the city used the burying-ground in a careless and negligent manner, and that they failed to use such care and precaution as would have prevented any special injury to the plaintiff not common to the public, and that the injury resulted therefrom to the plaintiff, to find for him."

This sufficiently advised the jury that there could only be a recovery for injuries to plaintiff not common to the public, which were the result of the negligence and carelessness of the defendant.

The requested instruction certainly was not correct, because if it had been given, there could be no finding for the plaintiff, "unless the jury found, from the evidence, that the inju-

ries arising from the noxious odors," etc., complained of were the direct and immediate cause of defendant's negligence.

There is no evidence that these "injuries" of the plaintiff were "the direct cause of defendant's negligence"; but there is evidence "that defendant's negligence" was "the direct and immediate cause" of plaintiff's injuries.

It is further complained that there is no evidence that the city had possession and control of the land adjoining plaintiff, and that, the court's charge having submitted this as a condition precedent to a recovery, the finding to that effect was contrary to the charge.

The evidence as to the control or possession of the land upon which the nuisance complained of was committed and permitted was the city ordinance 254, describing the burial-grounds and place of deposit for filth, garbage, offal, dead animals, etc., and regulating the burial of the same, passed in May, 1880, and which designated for this purpose the lot or tract of land adjacent to plaintiff's, and the testimony of the witness Evans, that he had frequently recognized it in passing the tract as that so designated, and the further evidence of Crawford, that the defendant took possession of this land in 1881, and that the city passed an ordinance prohibiting under penalty persons from depositing all offensive matter there, and appointed a policeman for the purpose of watching and detecting parties so doing. This evidence, with the further fact that the city by ordinance directed the city scavenger to deposit filth, garbage, dead animals, etc., on this ground, and regulating the manner in which this should be done, both by him and private parties, established unmistakably the exercise of control and possession upon the part of the city over this property, making it liable for any nuisance committed by it or which it could prevent.

The evidence also is, it is true, that other persons than the city scavenger made the deposits complained of, but it was clearly shown that the scavenger Pardue was grossly negligent and careless in the performance of this duty, and that he was remonstrated with by plaintiff, and that the city authorities were informed of the nuisance and its cause.

The effects upon plaintiff of the negligent manner in which these deposits were made were detailed at length. His home was rendered almost uninhabitable, his family and himself were kept in bad health, and he was, in the language of a witness, "a walking skeleton." This was caused by the noxious

vapors arising from these deposits either left exposed on the ground or partially buried. The stench was so offensive that he had to shut his doors to eat and sleep. It was a continual nuisance, and rendered his property, as a habitation, worthless. For a year and a half he lost half of his time by reason of sickness. Paid one doctor sixty dollars, and bought and paid for medicines. Paid fifteen dollars a week to have his business attended to. After the ordinance was passed the burying amounted to nothing. Before it was passed it was not so offensive. The testimony shows that the filth on this place of deposit was indescribable, and was so offensive as to make persons passing sick, and could be perceived a mile away.

These facts were sufficient to support the verdict.

There is no doubt that a distinction exists between the liability of a municipal corporation for acts done exclusively for a public purpose, and those done for its own private advantage. The distinction is, that in the former case it is only liable for the negligent or careless execution of its daty. In the latter it is liable, as would be an individual, for all damages resulting from the act, irrespective of the question of negligence: Wood on Nuisances, sec. 745.

There is also no doubt that every person has a right to have the air diffused over his premises free from noxious vapors and noisome smells that would not exist there except for the acts of the party complained of, and which are prejudicial to health, or nauseous to the smell, or trench upon the rights of the person affected thereby: Wood on Nuisances, 471–473. "In case of noisome smells arising from noxious vapors, the stench must be of such character as to be offensive to the senses, or to produce actual physical discomfort, such as naturally interferes with the comfortable enjoyment of property. It is not necessary that it should be hurtful or unwholesome. It is sufficient if they are so offensive or produce such annoyance, inconvenience, or discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities": Id., sec. 495. And "when a municipal corporation has ample power to remove a nuisance that is injurious to health, endangers the safety or impairs the convenience of its citizens, or when in the prosecution of a public work it creates a nuisance (or permits it to remain), it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its unlawful acts": Id., sec. 744.

We believe these to be the legal principles applicable to this case, and we are of opinion that the judgment should be affirmed.

LIABILITY OF CITY FOR CREATING OR MAINTAINING A NUISANCE. — The general rule of law undoubtedly is, that a municipal corporation has no more right to erect and maintain a nuisance than has a private individual; and an action may be maintained against such corporation for injuries occasioned by a nuisance, in any case in which, under similar circumstances, an action could be maintained against an individual: *Harper* v. *Milwaukee*, 30 Wis. 365; *Pittsburg* v. *Grier*, 22 Pa. St. 54; *Brower* v. *Mayor etc. of New York*, 3 Barb. 254. In other words, towns will not be justified in doing an act lawful in itself, in such a manner as to create a nuisance, any more than individuals. And if a nuisance is thus created, whereby another suffers damage, towns are, like individuals, answerable therefor: *Mootry* v. *Danbury*, 45 Conn. 550. To make a city so responsible, it must always be remembered that it is necessary that the act complained of be done by authority of the corporation, or by a branch of its government invested with power and jurisdiction to act for it, upon the subject to which the particular act relates, or that, after the act has been done, it has been ratified by the corporation by any similar act of its officers: *Thayer* v. *Boston*, 19 Pick. 511; 31 Am. Dec. 157. For a town is not liable for acts which result in creating a nuisance to property, when the acts complained of are not within the scope of its corporate powers; nor is a town generally liable for the illegal and unauthorized acts of its officers or employees, even when acting within the scope of their duties: *Seele* v. *Deering*, 79 Me. 343; 1 Am. St. Rep. 314; *Thayer* v. *Boston*, 19 Pick. 511; 31 Am. Dec. 157.

A municipal corporation, it seems, has no control over nuisances within its corporate limits, except such as is given by its charter, or by general law, and there can be no recovery on a complaint against such corporation for injuries caused by a nuisance, which does not show that the corporation has such control as makes the wrong a violation of a legal duty, imposed by such charter or by a general law: *Maitinowsky* v. *Hannibal*, 35 Mo. App. 70.

If a municipal corporation, without pretense of authority, and in direct violation of statute, assumes to grant to an individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must itself be regarded as maintaining a nuisance so long as the obstruction is continued by reason of and under such license; and it is liable to damages naturally resulting therefrom to a third person, who is injured in his person or property by reason of or by coming in contact with such obstruction in the street: *Cohen* v. *Mayor etc. of N. Y.*, 113 N. Y. 532; 10 Am. St. Rep. 506.

A city is liable to indictment for erecting or maintaining a public nuisance, and it is also liable in damages at the suit of a private person who sustains special damages therefrom: *Brower* v. *Mayor of N. Y.*, 3 Barb. 254; *People* v. *Albany*, 11 Wend. 539; 27 Am. Dec. 95; *Hunt* v. *Mayor of Albany*, 9 Wend. 571. If it allows its streets to remain out of repair, thus creating a nuisance, as in *Davis* v. *Bangor*, 42 Me. 522; *State* v. *Portland*, 74 Id. 268; 43 Am. Rep. 586; or if it neglects to abate a nuisance which it has the power to remove, as in *State* v. *Shelbyville*, 4 Sneed, 176; or if it permits a public nuisance to exist on its property: *St. John* v. *Mayor*, 3 Bosw. 483; *Harper* v. *Milwaukee*, 30 Wis. 365, — it is liable to be indicted and punished the same as an

individual. Thus in *People* v. *Albany*, 11 Wend. 539, 27 Am. Dec. 95, it was held that an indictment lay against a city for neglecting what the common good required, as where it, having power to direct the excavating, deepening, or cleansing of a basin or pond connected with the river, neglected to take the necessary measures in that respect, and allowed the basin to become foul by an aggregation of mud and other vile substances, so that the water was corrupted and the air infected with loathsome and unwholesome stenches. So an indictment may be maintained against a city which has, under its charter, power to enact ordinances necessary to prevent and remove nuisances and to preserve the public health, where it does not cause to be abated or removed a slaughter-house kept to the detriment of the public health on land within the corporate limits: *State* v. *Shelbyville*, 4 Sneed, 176.

In order to maintain a private action, the injury resulting from a nuisance must be special and particular, and not such as is sustained by all the public in common. Thus where the sole cause of complaint is, that an unauthorized erection in the street causes an obstruction to and a nuisance in the highway, the remedy is by indictment, but when special damages are sustained by reason of such obstruction, the injured party's remedy is by civil action for damages, or to abate the nuisance: *Morrisson* v. *Hinkson*, 87 Ill. 587; 29 Am. Rep. 77. In this case, damages were recovered against a city for erecting a water-tank and engine in the center of the street, and occupying one half thereof for the purpose of supplying the city with water, it being held that such was not a use to which the street could appropriately be put, and that an adjoining lot-owner did not take subject to any such easement.

A city having the right to collect and deposit refuse matter in a public dock, where it would ordinarily be distributed by the elements, so as not to create a nuisance, has no right to allow such deposits to so accumulate as to obstruct navigation and create a public and private nuisance; and if the city neglects or refuses to remove the matter and abate the nuisance, it is liable to indictment for the public nuisance, and to an action in tort by the property owners injured by the private nuisance: *Franklin Wharf Co.* v. *Portland*, 67 Me. 46; 24 Am. Rep. 1. This case is almost identical with that of *Brayton* v. *Fall River*, 113 Mass. 218, where the court held that an action in tort might be maintained against a city for obstructing a wharf erected upon tide-water with rubbish from its sewers. "An individual," says the court in that case, "cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. The only remedy is by indictment or other public prosecution. But if, by reason of a public nuisance, an individual sustains pecuniary injury differing in kind, and not merely in degree or extent, from that which the public sustains from the same cause, he may recover damages in a private suit for such peculiar injury. We are of opinion that this was an injury special and peculiar to him, for which he may maintain this action. He has a right to the water at his wharf at its natural depth. By the filling up of the dock, his use of his wharf for the purposes for which it had been constructed and actually used was impaired, and he was subject to an inconvenience and injury not common to the public." To the same effect is *Petersburg* v. *Applegarth*, 28 Gratt. 321; *Breed* v. *Lynn*, 126 Mass. 367. An adjacent house-owner, who, with his family, is seriously annoyed by the loud noises and offensive odors from peddlers selling their produce from wagons in the public park in front of and near his house, disturbing the comfort, sleep, and conversation of his family, may enjoin the city from using or authorizing or taking pay for the use of the place mentioned for the sale of goods, although the nuisance may also be

a public one, to be remedied as such by indictment, and although the city does not create the nuisance, but only takes fees from the peddlers who do create it: *McDonald* v. *Newark*, 42 N. J. Eq. 136. In all such cases, the plaintiff, upon satisfying the court that the cause of complaint is a private nuisance to his property, is entitled to injunction or other relief against the city as he would be against an individual. But the court, in granting relief, especially if by injunction, always postpones its operation for a reasonable time, in order to enable the defendant to take adequate measures to remove the nuisance without unnecessary injury to the public health or interests: *Breed* v. *Lynn*, 126 Mass. 367–370.

As a general rule, a municipal corporation having the exclusive care and control of the streets in a city is obliged to see that they are kept safe and free of obstruction for the passage of persons and property, and to abate all nuisances that might prove dangerous; and for a neglect of this duty, the city is liable for the damages sustained: *Chicago* v. *Robbins*, 2 Black, 418. In addition to what has been said above upon this subject, it has been held that objects within the limits of a street, which in their nature may be calculated to frighten horses of ordinary gentleness, may be nuisances, which it is the duty of the town to remove, and for the non-removal of which it is liable in damages: *Ayer* v. *Norwich*, 39 Conn. 376; 12 Am. Rep. 396; *Morse* v. *Richmond*, 41 Vt. 443; 98 Am. Dec. 600. In the case from Connecticut, the cause of complaint was a large tent erected in the street; and in the Vermont case, complaint was made of bales of hay left in the street. In all such cases, it must be shown that the nuisance is the direct and immediate cause of the injury, and the character of the object must be such as to make the danger obvious, and the duty and power of the town to remove it clear. Thus where the city licenses a public exhibition of wild bears, knowing it to be well calculated to frighten horses and endanger lives and property in the streets, such act of the officers of the city makes the city liable in damages to one injured in consequence thereof: *Little* v. *Madison*, 42 Wis. 643; 24 Am. Rep. 435. In this case the court said: "We should certainly hesitate to sanction the principle that a municipal corporation might knowingly and unnecessarily permit or authorize a nuisance or dangerous obstruction to be placed in one of its streets without being answerable in damages therefor." In the subsequent case of *Hubbell* v. *Viroqua*, 67 Wis. 343, 58 Am. Rep. 866, the plaintiff sought to recover from the city for injury from a bullet coming through a tent constituting a shooting-gallery, adjoining the sidewalk, and which was licensed by the city as such, and the court held that such a shooting-gallery was not a nuisance *per se*, and that plaintiff could not recover. This case holds that a mere license to carry on a lawful business within the city limits cannot be construed as a license to carry on the business in an unlawful manner, so as to create a public nuisance, nor is the city liable for the abuse of such license by the licensee. The case also contains a learned discussion respecting the liability of a city for a nuisance created under a license granted by it, and cites many cases from this series.

The law is well settled that a city licensing a business which is well known to it to be such as may constitute a nuisance, and which it has no right to authorize, is itself guilty of maintaining a nuisance, and liable to the party damaged thereby: *Cohen* v. *Mayor etc. of New York*, 113 N. Y. 532; 10 Am. St. Rep. 506; *Stanley* v. *Davenport*, 54 Iowa, 463; *McDonald* v. *Newark*, 42 N. J. Eq. 142. A city is liable for erecting or maintaining a pest-house, whereby plaintiff's house becomes unhealthful, and infected with a malignant and infectious disease, and its occupancy rendered unsafe and unpleasant:

Hagg v. *Board of Commissioners*, 60 Ind. 511; *Niblett* v. *Nashville*, 12 Heisk. 684; 27 Am. Rep. 755. The liability of cities for maintaining or creating nuisances has been often demonstrated in those cases arising from sewers which the city is authorized to build under power granted it to establish a system of grading and drainage, and it is universally held that this power must be exercised in such manner that it will not prove a nuisance to the citizens; and if a sewer is so constructed that surface-water, charged with the filth of sinks, privies, garbage, or other offensive matter, is discharged and thrown upon the land of a property owner within the limits of the city, so as to produce noxious scents and sickness, and render the enjoyment of such property impossible, the city is liable in damages. When such a sewer is so constructed or obstructed as to create a nuisance, it is the duty of the city to abate it, and if it does not do so, it is guilty of maintaining it; and as it is a continuing nuisance, the city is liable therefor: *Smith* v. *Atlanta*, 75 Ga. 110; *Seifert* v. *Brooklyn*, 101 N. Y. 135; *Clark* v. *Rochester*, 43 Hun, 271; *Hooker* v. *Rochester*, 37 Id. 181; *City of Crawfordsville* v. *Bond*, 96 Ind. 236; *Semple* v. *Vicksburg*, 62 Miss. 63; 52 Am. Rep. 181; *Thurston* v. *St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Haskell* v. *New Bedford*, 107 Mass. 208. When a city or town is authorized to construct sewers, or to use natural streams as sewers, it will not be assumed that it was the intent to authorize the construction of such sewer in such manner as to create a nuisance, unless that is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the intent was that it should be so done: *Morse* v. *Worcester*, 139 Mass. 389. It has also been held that the city is liable for so creating a nuisance, though the sewer is constructed after the most approved plan, with the best materials, and by the most skillful workmen: *City of Jacksonville* v. *Lambert*, 62 Ill. 519. When a sewer is so constructed by the officers and employees of the city, it will be presumed that they acted under authority and within the scope of their powers and duties: *Kobs* v. *Minneapolis*, 22 Minn. 159. A city is liable for injuries resulting from a nuisance created by it by drawing off the water of a navigable stream during a dry season for the use of the city, so as to prevent navigation: *Gilmartin* v. *Philadelphia*, 71 Pa. St. 140. As was said before, the same liability attaches against the city when it allows a sewer to become improperly obstructed and to remain so as if it had originally created the nuisance in constructing the sewer: *Smith* v. *Alexandria*, 33 Gratt. 208; *Brayton* v. *Fall River*, 113 Mass. 218; 18 Am. Rep. 470; *Noonan* v. *Albany*, 79 N. Y. 470; 35 Am. Rep. 540, and note 543; *Hamilton* v. *Columbus*, 52 Ga. 435; *Harper* v. *Milwaukee*, 30 Wis. 365.

If a city permits a noisome accumulation of filth at the outlet of a public sewer, it is liable to indictment for the nuisance, although it exercised its best judgment in the adoption of the sewerage system, and used reasonable care in the construction of the sewer: *State* v. *Portland*, 74 Me. 268; 43 Am. Rep. 586. When a municipal corporation is proceeding to lay sewers and discharge filthy sewage upon the land of a property owner, which may probably cause injury to his health and sickness in his family, and where the nuisance is continuing, and likely to be permanent, and the consequences are not barely possible, but to a reasonable degree certain, equity will enjoin such nuisance before it is completed: *Butler* v. *Thomasville*, 74 Ga. 570; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396. So the city is liable for damages caused by the percolating of filthy water from its sewers upon the land of a resident within the city: *Wilson* v. *New Bedford*, 108 Id. 261.

When a municipal corporation has ample power to remove a nuisance that is injurious to health, or endangers the safety of its citizens, it is generally liable for all injuries resulting from a failure on its part to properly exercise the power possessed by it. This rule has been applied to injuries resulting from the fall of walls or buildings within the city limits, and of the dangerous condition of which the city has or ought to have had notice: *Kiley* v. *City of Kansas*, 69 Mo. 102; 33 Am. Rep. 491; and in such case it makes no difference that the wall is on private property. This case and that of *Paiker* v. *Macon*, 39 Ga. 725, may be regarded as the leading cases on this subject. In the latter case it was decided that a city is liable for injuries resulting from failure on its part to keep its streets free from obstructions, and if it allows a dilapidated and decayed wall to exist along a street so as to endanger the safety of persons passing, even though such wall is on private property, it is liable for its failure to abate the nuisance when the wall falls and injures a passer-by along the street. In full accord with this ruling are the cases of *Bassett* v. *St. Joseph*, 53 Mo. 290; 14 Am. Rep. 446; *Baker* v. *Boston*, 12 Pick. 184; 22 Am. Dec. 421; but the contrary doctrine seems to obtain in New York as to walls on private property: *Cain* v. *Syracuse*, 95 N. Y. 83. And as relating to the duty of the municipality to abate and remove the nuisance, it is held in *City of Hannibal* v. *Richards*, 82 Mo. 330, that the city cannot create a nuisance upon the property of a citizen and compel him to abate it, but the city must perform that duty itself.

As to the liability of cities for maintaining nuisances, there exists a wide distinction as between acts done exclusively for a public purpose, and those done for their own private purposes and advantages. When the municipality is doing an act for the public benefit, which results in creating a nuisance, it is only liable for the careless or negligent exercise of its duty; but when the work done is private, or for its own private advantage, it is liable for all damages resulting therefrom, no matter whether it was negligent or not: *Bailey* v. *New York*, 3 Hill, 531; *Oliver* v. *Worcester*, 102 Mass. 489; *City of Fort Worth* v. *Crawford*, 64 Tex. 202; 53 Am. Rep. 753; *Davis* v. *Montgomery*, 51 Ala. 139; 23 Am. Rep. 545. And it has been held that power conferred upon a municipality to abate nuisances is conferred for the public good, and not for any private corporate advantage, and that for a failure of its officers to properly exercise such power, the city is not liable: *Armstrong* v. *Brunswick*, 79 Mo. 319.

It is not an indictable nuisance for the city authorities to burn infected bedding and clothing to prevent the spread of small-pox, using proper means and precautions for the safety of others, although such burning causes inconvenience to a few persons by noxious smoke and vapors: *State* v. *Knoxville*, 12 Lea, 146; 47 Am. Rep. 331.

GARRETT *v.* CHRISTOPHER.

[74 TEXAS, 453.]

DEEDS — QUITCLAIM — BONA FIDE PURCHASER. — One holding or claiming under or through a quitclaim deed cannot claim protection as a *bona fide* and innocent purchaser.

DEEDS — QUITCLAIM. — WHETHER DEED IS QUITCLAIM or not depends upon the intent of the parties making it appearing from the face of the instrument, and the use of the word "quitclaim" will not restrict the conveyance if other language employed in the instrument indicates an intention to convey the land itself.

Charles I. Evans, for the plaintiff in error.

Spoonts and Legett, for the defendant in error.

ACKER, P. J. D. F. Garrett brought this suit against J. H. Christopher in trespass, to try title to 160 acres of land patented to I. G. Mabry, assignee of Tilghman Berry. Both parties deraign title from the patentee.

The plaintiff claims title through a lost deed, alleged to have been executed by the patentee to William A. Hall on February 1, 1856, and mesne conveyances to himself.

The defendant claims title through conveyance from the widow and children of Mabry, the patentee, to George W. Jalonick and C. Von Carlowitz, executed in 1881, and mesne conveyances to himself.

The trial was without a jury, and judgment rendered for defendant, from which this writ of error is prosecuted.

The court filed conclusions to the effect that the plaintiff had failed to prove the execution of the lost deed under which he claims, and that the defendant was a *bona fide* purchaser of the land for a valuable consideration paid by him without notice, actual or constructive, of plaintiff's claim.

Under the view we entertain as to the law which must govern in the disposition of the case, it will be sufficient to consider the fourth assignment only, which relates to the court's conclusion that the defendant was an innocent purchaser for value; for if the court was correct in that conclusion, it is immaterial whether plaintiff proved the execution of the lost deed or not. Plaintiff's title papers were not filed for record until the eighth day of December, 1884. The defendant purchased the land and received a conveyance therefor on the third day of May, 1884. It is certain that he did not have

constructive notice of plaintiff's prior unrecorded title at the time he purchased, and it is not claimed that he had actual notice. It was proved conclusively that he paid the consideration of twelve hundred dollars in cash at the time he purchased the land.

But it is contended by plaintiff in error that the deed from the widow and children of the patentee to C. Von Carlowitz, through which defendant claims, is a quitclaim, and will not support the defense of innocent purchaser.

If the deed is a quitclaim, in the strict sense of that species of conveyances, then the assignment is well taken. Whether the conveyance be a quitclaim or not, is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of innocent purchaser. If it appears that it was the intention to convey the land itself, then it is not such quitclaim deed, although it may possess characteristics peculiar to such deeds. The use of the word "quitclaim" does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself: *Richardson* v. *Levi*, 67 Tex. 366; *Tram Lumber Co.* v. *Hancock*, 70 Id. 314.

The language of the deed now under consideration is: "Do by these presents sell, convey, remise, release, and quitclaim unto the said C. Von Carlowitz, his heirs and assigns forever, all our right, title, claim, interest, and demand in and to and for" the land, describing it. Had the deed stopped here, and contained no language indicating a different intent, we would be constrained to hold that it is quitclaim, and conveyed only the vendor's chance of title instead of the land. In immediate connection with the language just quoted the deed contains the following: "To have and to hold the above-described premises unto the said C. Von Carlowitz, his heirs and assigns forever." From this language we think it quite clear that the parties intended by this instrument to convey the land itself, and that it is not simply a quitclaim deed.

We think the court did not err in the conclusion complained of by the fourth assignment, and we are of opinion that the judgment of the court below should be affirmed.

QUITCLAIM DEEDS. — As to whether the grantee in a quitclaim deed can claim title as an innocent purchaser: *Hockenhull* v. *Oliver*, 80 Ga. 89; 12 Am. St. Rep. 235, and cases in note.

QUITCLAIM DEEDS CONVEY all the title possessed by the grantors as effectually as any other deeds: *Taylor* v. *Opperman*, 79 Cal. 468; *Spaulding* v. *Bradley*, 79 Id. 450; compare note to *Thorn* v. *Newsom*, 53 Am. Rep. 749–752.

RUE *v.* MISSOURI PACIFIC RAILWAY COMPANY.

[74 TEXAS, 474.]

RAILROADS — POWER OF GENERAL MANAGER TO MAKE LEASE. — A general manager of a railway with power to manage and control its stock-yards has no power to lease them, and turn over their control and management to another, unless expressly authorized so to do in writing.

CONTRACT OF CORPORATION AFFECTED BY LAW OF STATE CREATING IT. — A contract or lease made in Texas by a citizen thereof and a railway company which owes its existence and derives its powers from the laws of another state, if void in such other state is void in Texas, and no acts of ratification can validate or make it effective.

Hare and Head, for the appellant.

R. C. Foster and A. E. Wilkinson, for the appellee.

ACKER, J. In the spring of 1881 appellant entered into a parol contract with Hill, the general freight agent of appellee, to become stock agent for appellee, at a salary of two thousand dollars a year, and to lease from appellee its stock-yards at Vinita and Muscogee, in the Indian Territory, and at Denison and Gainesville, in Texas, for a term of five years, at the annual rental of eight hundred dollars per year, payable quarterly in advance, appellee to pay him one dollar a car for loading and unloading stock, he to furnish forage for the stock, to be charged against shippers, collected by appellee, and paid to him. A. A. Talmage, general manager of appellee's road, was in Denison when the contract was entered into between Hill and Rue, and assented to it. Appellant immediately entered upon the performance of his duties under the contract, both as stock agent and lessee of the yards, and soon thereafter made a contract with J. S. Talmage, brother of A. A. Talmage, by which J. S. Talmage became the owner of two-thirds interest in the stock-yards contract. On June 1, 1881, that part of the contract relating to the lease of the stock-yards was reduced to writing, and executed in the city of St. Louis, Missouri, by being signed "the Missouri Pacific Railway Company, by A. A. Talmage, general manager," and R.

H. Rue, J. S. Talmage not appearing to be a party to the contract.

Appellant continued to operate the stock-yards under his lease, paying rent and receiving pay for his services from appellee, until in February, 1883, when he received notice from appellee to surrender the yards. Appellant refused to obey this notice, and continued to run all the yards until May, 1883, when appellee took forcible possession of the Denison yards, and discontinued all business at the Vinita yards. Appellant continued in possession of all yards named in the contract, except the Denison yards, and continued to operate them down to the time of the trial, and was paid by appellee for his services according to the contract, but appellee refused to receive from appellant the rents due on the contract, after it took possession of the Denison yards. This suit was brought by appellant to recover damages for breach of the contract of lease by depriving him of the Denison yards, and discontinuing the business at the Vinita yards.

The stock-yards were the property of the Missouri, Kansas, and Texas Railway Company, appellee being lessee of the railroad, property, and franchises of that company. A. A. Talmage was appointed general manager of the Missouri, Kansas, and Texas Railway Company on December 1, 1880, and continued in the same position for appellee when the road came into its hands. Appellant ceased to be stock agent in October, 1882.

The written contract of lease, executed on June 1, 1881, was offered in evidence by appellant, and was objected to by appellee, on the following grounds:—

"Because said instrument is not shown to have been executed by defendant, or by any one by it thereunto lawfully authorized, and because it is not shown to have been executed by any one authorized thereunto by writing; because it does not appear to have been executed by an officer authorized by law, and is not under the corporate seal, and no authority from defendant for its execution is shown; and because the acts shown and relied on as acts of ratification thereof were not done by any person shown to have authority to ratify said instrument; and because said acts were not shown to have been done by any person authorized by writing to ratify the same, nor by any person having authority to ratify the same, given by said corporation or its stockholders, or by its board of directors, nor with any knowledge on the part of said stock-

holders, nor of said directors, or any one representing said corporation, of the existence or terms of said lease; and because such acts were not in themselves sufficient to constitute a ratification under the circumstances under which they were done; and because said lease is unlawful, beyond the power of the corporation to make, contrary to public policy, and void."

The objection was sustained, the lease executed, and judgment rendered for appellee.

It does not appear from the findings of the court whether the objection was sustained upon a part only or all of the grounds stated. If any of these grounds was sufficient to support the objection, then the ruling of the court must be sustained. Under the view we entertain of the law of the case, it is not necessary to consider all of them.

It is contended by appellant that the appointment of A. A. Talmage to the position of general manager, together with the control exercised by him over the stock-yards by virtue of his office, conferred upon him authority to make the lease.

Article 548 of our statutes provides that no estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing. The lease being for a term of more than one year, to be valid, must have been executed by appellee or by its agent thereunto authorized by writing.

There is no pretense that Talmage ever had any express authority, by resolution of the board of directors or otherwise, to make the lease. We understand the word "thereunto," used in the statute quoted, to mean unto this or that,—that is, the particular thing done.

We do not think the power to control and manage the yards, which were necessary appurtenances to carrying on the business of common carrier of stock, carried with it the power to dispose of the yards by leasing them and turning over their management and control to another.

Appellee owes its existence to the constitution and laws of the state of Missouri, under and by virtue of which it obtained its being, and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons—corporations—can

do only those things which by express grant or necessary implications they are authorized or empowered to do by the state under which their charters were obtained.

The laws of Missouri, section 818 of the Revised Statutes, provides that no president, director, officer, agent, or employee of any railroad corporation operating a railroad shall hereafter be interested in any manner, directly or indirectly, in furnishing materials or supplies to such company; nor shall any such officer, agent, or employee of any railroad company or other corporation owning, controlling, or managing a railroad, be interested, directly or indirectly, in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled, or operated by the corporation of which he is an officer, agent, or employee. That appellant was the stock agent and employee of appellee at the time the contract of lease was executed, there is no controversy. It is equally clear to us that by the terms of the contract he became interested in furnishing supplies (forage for live-stock) to appellee, and that he also became interested in the business of transportation as common carrier over the roads operated by appellee.

Under the law, appellee, as common carrier, was bound to transport live-stock, and to furnish forage for their sustenance. The forage so furnished by appellant was furnished to the company, and the supplying of forage was an indispensable part of the business of common carrier of that kind of freight. Had the contract been entered into by the president and secretary of the company after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the state, from which appellee derived its existence and powers: Story on Conflict of Laws, 174, 175, note a; *Matthews* v. *Skinker*, 62 Mo. 331; 21 Am. Rep. 425; *Black* v. *Delaware etc. Canal Co.*, 22 N. J. Eq. 422.

We think the statute of Missouri a wise and beneficial law, and that it applies to all corporations chartered under the laws of that state, without regard to whether the prohibited contract is to be performed within or without that state.

We think it wholly immaterial whether the instrument be called a lease or a contract. It was prohibited by the laws of Missouri, to which those dealing with appellee must look to see what contracts it could make.

No acts of ratification can validate or make effective that which is void.

We deem it unnecessary to consider other questions presented. We are of opinion that the court did not err in excluding the contract of lease, and that the judgment of the court below should be affirmed.

PRINCIPAL AND AGENT. — Authority of an agent to execute an instrument in writing must be in writing: *Alabama etc. R. R. Co.* v. *South etc. R. R. Co.*, 84 Ala. 570; 5 Am. St. Rep. 401, and note; compare *Humphreys* v. *Finch*, 97 N. C. 303; 2 Am. St. Rep. 293.

CORPORATIONS CANNOT RIGHTFULLY DO ANYTHING which is not expressly or by necessary implication permitted by the law creating them: *Pittsburgh etc. R'y Co.* v. *Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517; *Elevator Co.* v. *Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798; *Chicago G. L. Co.* v. *People's G. L. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124.

MISSOURI PACIFIC RAILWAY COMPANY *v.* BRIDGES.

[74 TEXAS, 520.]

RAILROADS — DUTY TO MAINTAIN CROSSING, AND LIABILITY FOR NEGLIGENCE IN ITS CONSTRUCTION. — When a railway company voluntarily assumes to maintain a crossing over its track for the use of the public, knowing that it is so used, it is bound to keep it in a safe condition, and is liable for any injuries resulting to passengers over the crossing by reason of its negligent construction.

Whitaker and Bonner, for the plaintiff in error.

Giles and Hicks, for the defendants in error.

GAINES, A. J. This suit was brought by defendants in error to recover of plaintiff in error damages for injuries resulting in the death of their minor son. The accident occurred at a point on the company's track where it was crossed by a road which was used by the public as a highway. The crossing is at Golden, an unincorporated village in Wood County. The road was not recognized as a public highway by the authorities of the county. The railroad company had constructed a crossing for the road, and had made a bridge across a ditch on the side of its track. The bridge, having become old and out of repair, was reconstructed by the section-hands with the the old material, and dirt was thrown upon it, which concealed its defects. James D. Bridges, the son of defendants in error, attempted to cross the bridge on a mule; but the bridge gave way under the mule, and caused the son to fall

and to receive injuries from which it is claimed that he died. For the purposes of this appeal, it is conceded in the brief of counsel for plaintiff in error that the injuries so received resulted in his death.

The court charged the jury, in effect, that when a railway company recognized and maintained a crossing over its track for the benefit of the public, the company would be liable for injuries resulting to any one using the crossing by reason of defects in its construction. This charge is assigned as error. It is also assigned that the verdict of the jury is contrary to the law and evidence, because, as is insisted, the road not being a public one, the company was not liable in damages for the injury. In *Missouri Pac. R'y Co.* v. *Lee*, 70 Tex. 496, the doctrine is laid down that a road not established by authority of law, which crosses the track of a railroad, may be so used by the public, and recognized by the company, as to impose upon the employees of the latter in operating its trains the duty of ringing a bell or blowing a whistle upon approaching the crossing, as is prescribed by article 4232 of the Revised Statutes, in reference to the crossing of public roads. It is claimed, however, that there is a distinction between that case and the case now before us. This may be; but if a road may be made public merely by use and recognition so as to impose upon railroad companies a duty purely statutory, we think, for a stronger reason, that if they assume the duty of maintaining a crossing upon such road, and thereby impliedly invite the public to use it, they should be held bound to maintain it in a safe condition. It is so held by the supreme court of Minnesota, in the case of *Kelly* v. *Southern Minnesota R'y Co.*, 28 Minn. 98. The court, in support of their opinion, cite *Webb* v. *Portland etc. R. R. Co.*, 57 Me. 117, which volume is not accessible to us at this branch of this court. The company may be under no obligation to maintain the crossing of a road, not made public by law, which its track intersects. But if it voluntarily assumes to do so, knowing that it is a road in common use by the public, it in effect invites the use of it, and proclaims it safe, and should be held liable for any injuries resulting to passengers over the crossing by reason of its negligent construction. We conclude that, under the undisputed facts of the case, the plaintiffs were entitled to recover, and that there is no error in the charge of the court which requires a reversal of the judgment.

The damages are large, but not so excessive as to authorize

us to set aside the verdict on that ground. We declined to set aside a larger verdict under a very similar state of facts in *Missouri Pac. R'y Co.* v. *Lee, supra.*

The judgment is affirmed.

RAILROADS — CROSSINGS. — A railroad company interfering with a highway must restore it, making it as safe as before it was disturbed: *Evansville etc. R. R. Co.* v. *Crist*, 116 Ind. 446; 9 Am. St. Rep. 865, and note; *Louisville etc. R'y Co.* v. *Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; and its failure to do so constitutes actionable negligence in case of an injury caused thereby: *Evansville etc. R. R. Co.* v. *Carrener*, 113 Ind. 51. So a railroad company must keep in a reasonably safe condition a recognized way, used by the public in going to and from the depot: *Cross* v. *Lake Shore etc. R'y Co.*, 69 Mich. 363; *Hauks* v. *Boston etc. R. R. Co.*, 147 Mass. 495. And a railroad company cannot obstruct a crossing by partially closing it with standing box-cars: *Reed* v. *Chicago etc. R'y Co.*, 74 Iowa, 188.

EVANS *v.* WELBORN.

[74 TEXAS, 530.]

MARRIED WOMEN — SEPARATE PROPERTY — LIABILITY FOR HUSBAND'S DEBTS — INNOCENT PURCHASER. — When a deed in the wife's name fails to show that money paid for land belonged to her separate estate, or that it was intended to make the land her separate property, the land is liable to be seized and sold by her husband's creditors so as to vest title in a purchaser who pays a valuable consideration without notice of her equities before the purchase. The payment of five dollars by a creditor at a sale under his own judgment will not entitle him to protection as an innocent purchaser for value.

MARRIED WOMEN — SEPARATE PROPERTY — RESULTING TRUST. — Where land is paid for with the separate money of the wife, and the deed is taken in her name, a resulting trust is created in her favor which cannot be defeated by levy of attachment against her husband, or any proceeding short of a sale of the land to an innocent purchaser for value.

LIS PENDENS — VENDOR AND VENDEE. — A purchaser of land, after institution of and during the pendency of suit by a third party to recover it, is charged with every thing that injuriously affects his vendor's title. As a purchaser *pendente lite*, he can make no defense not open to his vendor.

MARRIED WOMEN. — WIFE'S SEPARATE PROPERTY IN FACT is not liable for her husband's debts, and therefore no kind of conveyance or disposition of it can have the effect to defraud his creditors.

MARRIED WOMEN. — WIFE'S SEPARATE PROPERTY may be conveyed by herself and husband in trust, to be held and disposed of for her benefit, and if the property is intentionally or otherwise diverted from the purposes of the trust, the wife may sue for and recover it.

A. M. Carter, for the appellant.

W. C. Pendleton, and Bowlin and Bowlin, for the appellees.

HENRY, A. J. This suit was instituted on the thirtieth day of November, 1883, by Duanna Welborn, joined by her husband, William Welborn, against Thomas W. Welborn and Hannah and Byron Bartlett, to recover a tract of land alleged to be the separate property of said Duanna.

On the fourth day of June, 1884, B. C. Evans intervened in the cause, asserting title in himself to the land.

The record shows that William Welborn, the husband of Duanna Welborn, had made use of and lost in his business certain separate property of his wife, and that to reimburse her he invested the proceeds of other separate property belonging to her, and some money that he had borrowed for that purpose, in the land in controversy, taking the deed in her name. The record shows that the money, before it was paid for the land, had been given to and was in the possession of the wife. The deed to the wife contained nothing showing that the land was paid for with the separate money of the wife, or that it was intended to make it her separate property.

William Welborn, the husband, being insolvent, he, joined by his wife, deeded the land to Thomas Welborn, his brother, who gave his notes for the purchase-money. It is clearly proved that this conveyance was made for the sole purpose of preventing the creditors of William Welborn from subjecting the land to the payment of their demands, and that it was the intention of the parties that the notes of Thomas Welborn should not be collected, and that he should hold the land in trust for Duanna Welborn and sell it for her benefit. The deed to Thomas Welborn was made on the 27th of February, 1883.

William Welborn was indebted to Evans and Martin, and they, having sued on their debt, caused an original attachment to be levied on the land on the first day of March, 1883, as the property of said William Welborn.

Judgment was rendered in the suit foreclosing the attachment lien, and the land was purchased under the order of sale issued on said judgment by B. C. Evans, one of the plaintiffs in the judgment, who paid for it five dollars.

Thomas Welborn conveyed the land to Hannah Bartlett by deed dated March 1, 1883. Bartlett was to pay thirteen hundred dollars for the land, but before paying she required the notes given by Thomas Welborn to be surrendered. Accordingly, these notes were indorsed by Duanna Welborn and delivered to Thomas Welborn to enable him to perfect the sale of the land to Bartlett, but during the interval required to

execute this purpose, the attachment of Martin and Evans was levied on the land, whereupon Bartlett refused to pay the purchase-money.

The evidence is quite conflicting as to whether the deed from Thomas Welborn to Hannah Bartlett was ever delivered. It was left at the office of the county clerk either as an escrow or to be recorded. In fact, it was promptly recorded and delivered by the county clerk to Bartlett.

Though the consideration was to be paid in cash by Hannah Bartlett, no part of it has ever been paid; but on the first day of May, 1884, she deeded the land to B. C. Evans for the consideration of two hundred dollars, paid her by him.

The land is proved to have been worth two thousand dollars or more. The trial resulted in a verdict and judgment for plaintiffs, to reverse which the intervenor, B. C. Evans, prosecutes this appeal.

There can be no controversy about the sufficiency of the evidence to show that William Welborn had become indebted to his wife, Duanna Welborn, by appropriating the proceeds of her separate property, and that, before the purchase of the land in controversy, he had paid to her a sum of money, to belong to her separately, and to be used by her in the purchase of land, to be likewise held as her separate property.

When the land in controversy was conveyed to her, the money so held by her paid the consideration. The deed failing to show that the money paid for the land belonged to her separate estate, or that it was intended to make the land her separate property, it was liable to be seized and sold by her husband's creditors, so as to vest title in a purchaser who paid a valuable consideration, without notice of her equitable right before the date of his purchase.

The land having been paid for with money that had been paid into her hands and made her separate property before it was invested in the land created a resulting trust in her favor, which, it has frequently been held by this court, could not be defeated by the levy of an attachment, or any proceeding short of a sale of the land to an innocent purchaser for value: *Stoker* v. *Bailey*, 62 Tex. 299.

If it be true that the intervenor had no notice of the wife's equity, it still must be held that the payment of the paltry sum of five dollars, at a sale made under his own judgment, cannot be held to entitle him to protection as a purchaser for value.

Whatever may be the fact about the delivery of the deed from Thomas Welborn to Bartlett, it is an undisputed fact that the terms of the sale were, that the consideration was to be paid in cash. Without that, the sale was incomplete. The purchaser declined to pay the money or complete the trade; and it was a palpable fraud for her to take advantage of an apparent delivery of the deed, and sell and convey the land to Evans. He testified that he purchased without notice of the non-delivery of the deed, if, in fact, it was not delivered. But he purchased after plaintiff had instituted this suit against his vendor for the land, and during its pendency; and he stands charged with knowledge of everything that injuriously affects his vendor's title. As a purchaser *pendente lite*, he can make no defense that his vendor cannot make.

The land having been, at the time of its conveyance by William and Duanna Welborn to Thomas Welborn, the separate property of the wife, it was not liable for the husband's debts, and therefore no kind of conveyance or disposition of it could have had the effect to defraud his creditors. The fact that the fears of the parties were excited, and that they were willing to convey it fraudulently, if that was necessary to protect it, or, that, if it had been the husband's property, they would have committed a fraud by conveying it to avoid the payment of his debts, does not change or affect the rule.

The land being, in equity, the wife's separate property, there was nothing improper in its being conveyed by her and her husband to Thomas Welborn in trust, to be held and disposed of for the benefit of the wife. The property having been, intentionally or otherwise, diverted from the purposes of the trust, it became the wife's right to sue for and recover the property.

We have carefully examined all of appellant's assignments of error, and, without referring to them in detail, we conclude that they show no error for which the judgment ought to be reversed, and it is therefore affirmed.

LIS PENDENS. — Purchasers of realty, pending a suit with respect thereto, are deemed to have notice of the claims set up in such suit: *Green* v. *Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760, and note; *Cheever* v. *Minton*, 12 Col. 557; 13 Am. St. Rep. 258, and note; *Northern Bank* v. *Deckeback*, 83 Ky. 154; *Sharp* v. *Elliott*, 70 Tex. 666; *Wisconsin etc. R. R. Co.* v. *Wisconsin etc. Co.*, 71 Wis. 94.

MARRIED WOMEN — SEPARATE ESTATE. — The separate property of a married woman is not subject to the debts of her husband: *Botts* v. *Gooch*, 97

Mo. 88; 10 Am. St. Rep. 286; *Berry* v. *Goodger*, 80 Ga. 620; *Long* v. *Efurd*, 86 Ala. 267; *Stratton* v. *Bailey*, 80 Me. 345; *Taggart* v. *Fowler*, 25 Neb. 152. But see *Driggs* v. *Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and cases collected in note.

RESULTING TRUSTS, WHEN AND HOW CREATED: *Reynolds* v. *Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note. A trust results in favor of the wife, where her husband purchases land with her money and takes title in his own name: *Bigley* v. *Jones*, 114 Pa. St. 510.

HARRIS *v.* HOWE.

[74 TEXAS, 534.]

COMMON CARRIERS — CONNECTING LINES. — No distinction exists between the carriage of goods and passengers as to the liability of a railroad selling a through-ticket beyond its terminus, and over connecting lines, and as to the liability of the receiving company for freight shipped beyond its own terminus over connecting lines.

COMMON CARRIERS CONTRACTING TO CARRY BEYOND THEIR OWN LINES are estopped from denying their obligation to perform their contract.

COMMON CARRIERS — LIABILITY BEYOND TERMINUS. — Common carrier of goods or passengers may, by express contract, bind himself to carry any distance or to any destination, whether the carriage is to be accomplished by his own means of conveyance, or will require the employment of agents or subsidiary carriers beyond its own line; or it may, by express contract, limit its liability to its own line.

COMMON CARRIER'S OBLIGATION TO CARRY PASSENGERS OVER ITS OWN LINE cannot be modified by contract so as to exempt it from duty to protect the passenger from the consequences of the negligence of its servants or agents.

COMMON CARRIER OF PASSENGERS — LIABILITY OVER CONNECTING LINE. — A common carrier may, by express contract, confine its liability for negligence to a passenger to its own line, and make itself simply the agent of the connecting carrier so as to exempt itself from liability for the negligence of the operator of the connecting line.

E. B. Wheeler and R. S. Bryarly, for the appellant.

HENRY, A. J. This suit was brought by appellant against the appellee, as receiver of the Houston East and West Texas Railway Company, to recover damages.

Appellant charges that appellee, through its agent at Timpson, Texas, made with her an express contract to transport her and her three small children from Timpson, Texas, to Bolivar, Tennessee, as first-class passengers, in first-class coaches, for which appellant paid appellee in advance the compensation demanded, and that in disregard of such contract she and her children were compelled by a conductor on the route to leave the first-class coach, and enter the smoking-car of the train on which they were being transported, and

remain there from eleven o'clock at night until ten o'clock the next day, under circumstances and surroundings described as being very uncomfortable and disagreeable.

The evidence shows that appellant purchased from appellee a coupon ticket from Timpson, Texas, to Bolivar, Tennessee, paying it the price asked for it; that appellant asked appellee's agent, who sold her the ticket, if it was a first-class one, and he informed her that it was, and would carry her through all right, without any trouble whatever. The coupons were for passage over the Houston East and West Texas railway, the Vicksburg, Shreveport, and Pacific railway, and the Illinois Central railway. The price paid was the full local fare of each road added together, and the gross sum to which it was entitled was paid by the road receiving it to each of the other roads. Appellant was received and transported over the first two roads as a first-class passenger, but when she reached the Illinois Central, notwithstanding the ticket that she presented entitled her to travel in its first-class cars, the conductor insisted that it did not, and compelled her to go into a second-class car, and stay there, under the circumstances alleged in her petition.

The ticket is made part of the statement of facts, and among other printed clauses, contains one in the following words:—

"That in selling this ticket, the Houston East and West Texas Railway Company acts only as agent, and is not responsible beyond its own line."

The court charged the jury to find for defendant.

The question of the liability of a railroad selling a through-ticket beyond its own terminus, and over connecting roads, has been much discussed and different opinions have prevailed.

The same question has arisen with regard to the liability of the receiving company for freight shipped beyond its own terminus over connecting lines of transportation, but the existence of such liability, when assumed by contract, seems now too firmly established to justify further discussion.

There exists respectable authority to the effect that a distinction exists in this respect between the carriage of goods and of passengers: Hutchinson on Carriers, 464; 2 Redfield on Railways, 313.

Other authorities hold that there are no substantial distinctions between the rules governing the two subjects: *Quimby* v. *Vanderbilt*, 17 N. Y. 313; 72 Am. Dec. 469. In principle, we can see no distinction.

It has been contended that it is *ultra vires* for railroad corporations to contract to carry beyond their own lines, but the great weight of authority unquestionably is, that, however that may be, the carrier that engages in such an undertaking is estopped from denying his obligation to perform it.

In Hutchinson on Carriers, page 117, it is said, with regard to the carriage of goods: "It is universally conceded that he may bind himself by an express contract to carry to any distance or to any destination, whether the carriage can be accomplished by his own means of conveyance upon his own route or will require the employment of agents or subsidiary carriers beyond it. In this respect he may bind himself to the same extent as other contracting parties, even to the performance of impossibilities, if he will."

The obligation to convey passengers over its own line not only exists as a public duty, independently of any contract to do so, but from considerations of public policy it cannot even be modified by contract so as to exempt the carrier from the duty to protect the passenger from consequences of the negligence of its agents and servants: *Gulf, C., & S. F. R'y Co.* v. *McGown*, 65 Tex. 640.

Beyond its own line, a different rule in some respects prevails. It is only because the carrier has voluntarily contracted to do so that it can be required to transport a passenger over any other than its own line, and it results that, like other contracting parties, it may define the terms and limit the extent of its undertaking over other lines, insomuch as may be required to leave upon them the responsibilities of their own negligence.

The case of *Pennsylvania Central R. R. Co.* v. *Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490, was for the recovery of damages for the loss of baggage. The ticket sold by defendant to the passenger contained a stipulation as follows: "In selling this ticket for passage over roads west of Pittsburg, the Pennsylvania Railroad Company acts only as agent for the western lines, and assumes no responsibility west of Pittsburg."

The court says: "The defendants are not common carriers except between Philadelphia and Pittsburg. They were under no obligation to carry plaintiff beyond the termination of their route or to transport his baggage. It is true, they received the fare for the whole distance from Philadelphia to Cincinnati; and if that were all, it might raise a presumption of an agree-

ment to carry over the entire route between the two cities. But contemporaneously with the receipt of the fare, and as evidence of the contract into which they entered, they gave to the plaintiff a ticket informing him that they assumed no responsibility for his carriage, and of course for the carriage of his baggage, beyond Pittsburg. They notified him that they acted only as agents for the carriers whose route extended west from Pittsburg, and not at all for themselves. With this express disclaimer of personal liability, there is no possibility of implying an engagement. It is not to be doubted that the defendants could act as agent for a connecting railroad line, and if they could, the contract for carriage between Pittsburg and Cincinnati was with the principals of defendants, and not with themselves. Their own engagement was performed when they had transported plaintiff to Pittsburg, and delivered his baggage to the carriers on the connecting railroad beyond leading to Cincinnati. A carrier may not release himself from responsibility for want of ordinary care. Here, however, was no attempt by defendants to limit their responsibility as common carriers. There was nothing more than an express refusal to assume an additional and unusual liability,—a careful guarding against the implication of a contract, which, without the notice, might have arisen from the fact that the passage-money for the entire distance to Cincinnati was here received. This is the whole case. The plaintiff breaks down in the beginning. He fails to prove that these defendants contracted to carry him and his baggage beyond Pittsburg. His remedy, therefore, is not against them, but against the company which undertook for that portion of the route upon which the carpet-bag was lost."

It is equally clear in the case before us that the defendant's liability for negligence was, by the express terms of the contract, confined to its own line, and that it made the contract for the transportation of the passenger over the line where the alleged wrong was committed only as the agent of the corporation operating such line; and we conclude that, not being bound by its charter as a public carrier, or by contract, express or implied, to transport plaintiff over the Illinois Central railroad, the defendant was not liable in this action, and the court properly so charged the jury.

If any negligence of defendant in issuing the ticket had been the proximate cause of the wrong to plaintiff, the rule would

be otherwise. Upon the material issues in the case there is no controversy about the facts or conflicting evidence.

The judgment is affirmed.

CARRIERS — CONNECTING LINES. — As to the liability of connecting carriers for goods lost after carriage over the receiving line: *St. Louis etc. R'y Co.* v. *Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104, and note; *Wells* v. *Thomas*, 27 Mo. 17; 72 Am. Dec. 228, and extended note 230–247.

CONNECTING LINES OF CARRIERS — CARRIAGE OF PASSENGERS. — A part owner of one of several transportation lines running in connection with each other over several different portions of a route of travel may contract, as principal, to carry a passenger over the whole line, and may thereby become responsible for injury to such passenger or his luggage, happening upon any of the several lines: Note to *Quimby* v. *Vanderbilt*, 72 Am. Dec. 473, 474. A carrier specially contracting to carry passengers or freight to a point beyond its own line, which can only be reached by another line, makes the other line its agent, and will be liable for any damages resulting from the negligence of such agent: *Washington* v. *Raleigh etc. R. R. Co.*, 101 N. C. 239.

HAYDEN *v.* MOFFATT.

[74 TEXAS, 647.]

MARRIED WOMAN'S DEED AS EVIDENCE — DEFECTIVE ACKNOWLEDGMENT. — A certificate of an officer to a married woman's deed, not showing that she was known to him or proved to him to be the person whose name is subscribed to the deed, nor that she was examined by him privily and apart from her husband, and the deed explained to her, nor that she declared that she had willingly signed the same for the purposes and consideration therein expressed, is fatally defective, and insufficient to entitle the deed to registration, and therefore it is not admissible in evidence.

MARRIED WOMAN'S DEED — DEFECTIVE CERTIFICATE OF ACKNOWLEDGMENT. — A certificate of an officer to a married woman's deed, stating that "she acknowledged the same freely and willingly," is not a substantial compliance with a statute requiring such certificate to state that she "acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same."

MARRIED WOMAN'S DEED AS NOTICE. — WITHOUT SUCH ACKNOWLEDGMENT as the statute prescribes, there can be no conveyance of the lands of a married woman; and before such conveyance can be recorded so as to operate as notice, there must be attached to it a certificate of her acknowledgment in substantial conformity to the prescribed form.

MARRIED WOMAN'S DEED PROPERLY ACKNOWLEDGED in the manner and under the circumstances prescribed by law conveys the title.

MARRIED WOMAN'S DEED — RECORD AS NOTICE. — PROPER CERTIFICATE of an officer is sufficient evidence of the proper execution of a married woman's deed to admit it to record, and give it the effect of notice to subsequent purchasers. But if not properly acknowledged, the registration of the instrument is illegal, and does not constitute notice.

MARRIED WOMAN'S DEED — RECORD OF, AS NOTICE. — In a suit brought for that purpose, the proper acknowledgment of a married woman to her deed may be shown, and judgment obtained correcting the certificate; but such proof and judgment will not validate the prior registration of the deed as defectively acknowledged, and give it effect as notice to subsequent purchasers.

Barry and Etheredge, for the appellants.

Harris and Saunders, for the appellees.

ACKER, P. J. Appellant sued in trespass to try title to and for partition of an undivided one seventh of certain lands granted to John M. Lemon, who died leaving seven heirs, Mrs. M. A. Barbee being one of them, and both parties claim under her.

The case was disposed of before trial as to all defendants except appellees Finnell and Clayton, who pleaded not guilty, and filed special answer not necessary to consider.

The trial was without a jury, and resulted in a judgment in favor of appellees.

Appellants claim the land under a deed from Mrs. Barbee and her husband, Joseph A. Barbee, to them, executed in August, 1885. This deed was executed, acknowledged, and certified in the manner required by law for the conveyance of land by a married woman, and recited that it was executed in the place of a deed made by the same vendors to John M. January, the ancestor of appellants, in December, 1859, the deed to January having been lost.

Appellees claim the land under a deed from the same parties, of date April 12, 1882, to which the officer's certificate of Mrs. Barbee's acknowledgment is as follows: —

"State of Kentucky, }
"Harrison County. }

"I, Perry Wherritt, clerk of said county court, do certify that this deed from Margaret A. Barbee and Joseph A. Barbee, her husband, to Sarah T. Tingle, was produced to me in my office this day, and was acknowledged by the grantors to be their act and deed; and said instrument of writing being shown and explained to Mrs. M. A. Barbee separate and apart from her husband, she acknowledged the same freely and willingly, without fear or undue influence of her said husband, and desired the same certified and recorded.

"Given under my hand and seal of court this twelfth day of April, 1882.

[SEAL.] "P. WHERRITT, C. H. C. C."

Appellants objected to the introduction of this deed, upon the grounds that the certificate of acknowledgment does not show that Mrs. Barbee ever signed it for the purposes and consideration therein expressed. The certificate does not show that the deed was fully explained to her, and it does not show that she declared that she did not wish to retract it.

The objection was overruled, and the deed admitted in evidence, to which appellants excepted, and the correctness of this ruling is questioned by the first assignment of error. Our Revised Statutes provide:—

"Article 4313. The certificate of acknowledgment of a married woman must be substantially in the following form:—

"State of ——, county of ——. Before me (insert name and character of officer), on this day personally appeared ——, wife of ——, known to me (or proved to me on the oath of ——) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ——, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and considerations therein expressed, and that she did not wish to retract it."

We think it evident, from even a casual and superficial comparison of the certificate of acknowledgment with the form prescribed, that the certificate is not in substantial conformity to the statute. It is not shown by the certificate that the officer either knew Mrs. Barbee, or that she was proved to him to be the person whose name is subscribed to the deed. It is not shown that she was examined by the officer, and the deed explained to her by him privily and apart from her husband, nor does the certificate state that Mrs. Barbee declared that she had willingly signed the deed for the purposes and considerations therein expressed.

Unless it appears from the certificate that Mrs. Barbee was known, or proved in the manner prescribed, to the officer to be the person whose signature is subscribed to the deed, and being so identified, that the officer made the privy examination and explanation, and that, being so examined and having the deed so explained to her by the officer, she declared that she had willingly signed the same for the purposes and consideration therein expressed, the certificate is fatally defective and insufficient to entitle the deed to registration. Unless she willingly signed the deed for the purposes and consideration

therein expressed, in contemplation of the statute she has not signed it at all, and the certificate failing to show her identification, and failing to show that she declared that she had willingly signed the deed, we think it fails to show that Mrs. Barbee ever signed it for the purposes and considerations therein expressed: R. S., arts. 4309, 4310.

The certificate states that "she acknowledged the same freely and willingly," but this language is certainly not substantially the same as "acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same." She might "acknowledge the same willingly," without having signed it willingly.

Without such acknowledgment as the statute prescribes, there can be no conveyance of the lands of a married woman, and before such conveyance can be so recorded as to operate as notice, there must be attached to it a certificate of her acknowledgment in substantial conformity to the prescribed form. Having signed the deed willingly, she must acknowledge the fact in the manner required by statute.

When such acknowledgment is made to the proper officer in the manner and under the circumstances prescribed by the law, the deed takes effect, and conveys the title. The statute prescribes that the proper certificate of the officer shall be sufficient evidence of the proper execution of the deed to admit it to record, and give it the effect of notice to subsequent purchasers. If the certificate of acknowledgment does not state the facts essential to the conveyance, the registration of the instrument is illegal, and does not constitute notice.

The conveyance depends upon the proper acknowledgment of the execution of the deed, while the registration depends upon a proper certificate of the facts of acknowledgment.

Appellees may be able, in a suit brought for that purpose, to prove the proper acknowledgment by Mrs. Barbee of the deed to Mrs. Tingle, and obtain judgment correcting the certificate, but such proof and judgment would not validate the registration, and give it effect as notice to appellants: R. S., art. 4353; *Johnson* v. *Taylor*, 60 Tex. 361; *Davis* v. *Agnew*, 67 Id. 206.

We deem it unnecessary to consider the other ground of objection to the certificate, or to discuss other assignments.

We are of opinion that the court erred in overruling the objection, and admitting the deed, for which the judgment should be reversed, and the cause remanded.

MARRIED WOMEN. — Power of a married woman to make conveyances is wholly statutory: *Cook* v. *Walling*, 117 Ind. 9; 10 Am. St. Rep. 17; and therefore, to be effectual, her conveyances must comply strictly with the statutes giving her power to convey: *Williams* v. *Cudd*, 26 S. C. 213; 4 Am. St. Rep. 714, and note; *Aultman* v. *Rush*, 26 S. C. 517.

MARRIED WOMEN — ACKNOWLEDGMENTS TO DEEDS. — As to what are good and what are bad acknowledgments to deeds of married women: *Cox* v. *Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79, and particularly cases cited in note. A married woman's deed not properly acknowledged is absolutely void: *Bollinger* v. *Manning*, 79 Cal. 7. So all the contracts of a married woman are absolutely void, when not executed in conformity to statute: Note to *Carlton* v. *Williams*, 11 Am. St. Rep. 244.

REGISTRATION — NOTICE. — Void instruments are not entitled to be recorded: *Stone* v. *French*, 37 Kan. 145; 1 Am. St. Rep. 237; and an instrument void upon its face imparts no notice, even though it is actually recorded: *Oglesby* v. *Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177.

ST. LOUIS TYPE FOUNDRY *v.* INTERNATIONAL LIVE STOCK PRINTING AND PUBLISHING COMPANY.

[74 TEXAS, 651.]

EXEMPTIONS — PARTNERSHIP PROPERTY. — All tools, apparatus, and books belonging to any trade or profession owned by persons not constituents of a family, and constituting partnership property, are exempt from attachment and execution against either of the partners, under article 2337 of the Revised Statutes of Texas.

Blacker and Clardy, and Brack and Neill, for the appellant.

Millard and Patterson, and Davis, Beall, and Kemp, for the appellee.

HOBBY, J. The appellant, having brought suit against Whitmore and Kibbee as partners, in the district court of El Paso County, for the sum of $992.31, caused an attachment to be issued out of said court pending the suit, and seized by virtue thereof the press, type, and material belonging to a printing-office, as the property of said Whitmore and Kibbee.

The appellee claimed the property under a purchase from said Whitmore and Kibbee prior to the levy of said attachment, alleging that at the time of said purchase it was the exempt property of said Whitmore and Kibbee.

Appellant admitted that at the time of the purchase by appellee, the property belonged to the printing-office of Whitmore and Kibbee, and was used by them in their business as printers and publishers of a newspaper in the city of El Paso, Texas, but denied that it was exempt.

The judgment of the court was, in effect, that the property was exempt from attachment.

The question raised in the case is, whether, under our statute (R. S., art. 2337), reserving to persons not constituents of a family exempt from attachment, etc., "all tools, apparatus, and books belonging to any trade or profession," applies to and protects such property when held and owned by partners. We are not aware of any case in our state in which the question has been decided, and in the other states the decisions are conflicting.

In our state it has been held that a homestead may be established on property held by tenancy in common: *Clements* v. *Lacy*, 51 Tex. 151. So, too, it was held in *Swearingen* v. *Bassett*, 65 Id. 267, that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale. But the precise question now before us has not heretofore been determined in Texas.

"It often happens," says Mr. Freeman, "that property designated as exempt by statute belongs to two or more persons, either as co-tenants or partners. The question then arises, whether this property must be treated as exempt to the same extent as if held in severalty. The answers are irreconcilable, and the opposing opinions are both supported by respectable authorities. On the one hand, it is insisted that the terms of the exemption statutes indicate that estates in severalty were meant. On the other hand, co-tenants and partners in a majority of the states have been placed on the same footing, and both have been given the full benefit of the exemption laws. This latter position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and to accomplish the purrposes to which they are directed. Prominent among these purposes is the protection of the poor, by allowing them the implements of their trade, and the other means essential to enable them to gain a livelihood": Freeman on Executions, sec. 221.

The leading cases which announce the doctrine that the statute does not include partnership property are *Pond* v. *Kimball*, 101 Mass. 105, and *Guptil* v. *McFee*, 9 Kan. 30. These cases appear to be based upon statutes exempting tools, implements, etc., not to exceed in value a certain sum. (In the

Massachusetts case, tools, etc., not to exceed one hundred dollars in value; and in the Kansas case, "stock in trade not exceeding four hundred dollars in value.")

One of the prominent reasons assigned in the opinions in these cases was, that the statute limiting the exemption as to tools, etc., to one hundred dollars, and that limiting the stock in trade to four hundred dollars, did not apply to property owned by partners, because of the difficulty of determining, in case of numerous partners, whether each should have the right to claim as exempt one hundred dollars' worth of materials, or four hundred dollars stock in trade; or was the whole firm to be considered as one debtor only? No such reason would apply with us, as "all the tools, apparatus, and books belonging to any trade or profession," are exempt, without reference to their number or value.

The cases holding the contrary, and we believe the better doctrine, proceed upon the theory that the law should be liberally construed. It is almost unnecessary to say that that mode of construction has always obtained with respect to exemption laws in our state.

Where a person owns property exempt under the statute, as, for example, the property involved in this proceeding, he ought not to forfeit this valuable right because he forms a partnership and unites the property with that of another person equally exempt. If in this case either Whitmore or Kibbee had owned individually this property, it would have been exempt from execution, attachment, etc. The fact that while so owning it a partnership is formed would furnish no good reason for so changing the law as to make that property subject to attachment which, prior to the partnership, was exempt in the hands of the individual. If each owned one half of the property, it would be exempt; and because both own the whole by reason of the formation of the partnership, affords no reason why the same property should not continue to be exempt: *Stewart* v. *Brown*, 37 N. Y. 350; 93 Am. Dec. 578; and cases in section 221, Freeman on Executions.

One of the principal purposes of the statute is to protect whatever interest or title would be subject to seizure under execution or attachment. The partnership interest is liable to the levy of such writs, and is therefore entitled to the protection which the statute affords.

We think that "all tools, apparatus, and books belonging to

any trade or profession," although they may constitute partnership property, are entitled to the exemption.

We are of opinion that there is no error in the judgment, and that it should be affirmed.

Exemptions from Execution. — Partnership property is exempt from execution just as individual property is exempt, under statutes exempting from execution specific property: *Gilman* v. *Williams*, 7 Wis. 329; 76 Am. Dec. 219. But in California, partnership property is not exempt from execution, although it is such property as would be exempt if one partner were the sole owner: *Cowan* v. *Creditors*, 77 Cal. 403; 11 Am. St. Rep. 294, and compare cases cited in the note.

Pullman Palace Car Company *v.* Matthews.

[74 Texas, 654.]

Railroads — Liability of Sleeping-car Company. — A sleeping-car company which hires cars to railroads, reserving only the right to collect fares for the use of berths, and to retain on each car its own conductor and porter, is not liable as a common carrier or innkeeper, but must exercise reasonable care to guard passengers from theft; and if through want of such care, the personal effects of a passenger, such as he may reasonably carry with him, are stolen, the company is liable therefor.

Railroads — Liability of Sleeping-car Company for Negligence. — A sleeping-car passenger's negligence furnishing an opportunity to the company's servants to steal his money will not release it from its obligation to protect him from such servants' wrongful acts.

Todd and Hudgins, for the appellant.

Moore and Hart, for the appellee.

Henry, A. J. This cause originated in a justice court. Plaintiff testified that, being a passenger on a Pullman sleeping-car, he was awakened by the conductor about five o'clock in the morning, and informed that on account of a wreck ahead he would have to change cars; that, having partially dressed himself, he left his pocket-book, containing $165, lying upon the bedding of his berth, and went to the wash-room, from where, having finished dressing, he went out of the car, and forward to the wrecked train, some sixty or seventy yards distant; that immediately on arriving there, he missed his pocket-book, and went back to recover it. He found the conductor and porter in the smoking-room, and informed them of his loss. They immediately made search for the missing

pocket-pook, without finding it. There were four other passengers in the car, who all returned to it soon after plaintiff did, and all of whom, with the conductor and porter, were searched, without finding the money.

When plaintiff paid his fare, he was handed a check, upon which was printed the words: "Baggage, wearing apparel, money, jewelry, and other valuables taken into the car will be entirely at owner's risk, and employees of the company are forbidden to take charge of the same."

Plaintiff further testified that when he went to the wash-room, he found the four other passengers there, all of whom passed out of the car from the washing-room without going back to or by the berth on which he left his pocket-book, and that they did not return to the car until after he did. He testified that the place was in the woods, and he was not absent from the car more than three or four minutes, and that when he left the car, no one remained in it, except the conductor and the porter, who was a colored boy.

Defendant proved by the conductor of the train that it was engaged in the business of manufacturing sleeping-cars, and hiring them to the railroads, reserving the right to collect fares for the use of berths, and that defendant only charges for the use of its berths; that each Pullman car has its own conductor and porter; that witness (the conductor) sat during plaintiff's entire absence in the smoking department, in a position that commanded the rear door of the car, so that no one could enter or go out there without his seeing it, and that no one came to that door during plaintiff's absence, except the train brakeman, who was employed by the railroad company, and not by the Pullman company; that the brakeman and other train-men are by the rules of the Pullman company permitted to have ingress and egress to and from the Pullman cars; that this brakeman passed through the car and out onto its rear platform to take in the train signals during plaintiff's absence from the car; that no one else was in the car in the mean time, except witness and the porter; that witness did not take plaintiff's pocket-book, and did not know what became of it.

The porter testified for defendant that he was in the forward end of the car while plaintiff was absent, and that no one could enter that end of the car without his seeing it; that no one entered that end during plaintiff's absence, except the

train brakeman, who went through to take in the signals. He testified that he did not take the pocket-book, and did not know what became of it. This witness testified that the train brakeman, as he passed through the car, did not stop.

Plaintiff, in rebuttal, testified that when he returned to the car, the conductor and porter were both in the smoking-room. One of the passengers testified that he followed plaintiff on his return to the car, and that they found both the porter and conductor in the smoking-room.

Plaintiff recovered, and the defendant appeals and assigns errors as follows: 1. Because there was no evidence that defendant was negligent; 2. Because defendant was not a common carrier, and is not responsible for loss of property taken into its cars by passengers, unless such loss occurs through its negligence; 3. Because plaintiff's own negligence was the proximate cause of and contributed to his loss.

In the case of *Pullman Co.* v. *Pollock*, 69 Tex. 120, 5 Am. St. Rep. 31, the following language of the supreme court of Massachusetts used in deciding the case of *Lewis* v. *New York Sleeping Car Co.*, 143 Mass. 267, is quoted with approbation: "While it [the sleeping-car company] is not liable as a common carrier or as an inn-holder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor."

We think this doctrine is as applicable to the case now before us as it was in the cases in which it was asserted.

The evidence suggests either that the plaintiff did not lose any money, or that the servants of defendant, or one of them, found and appropriated it. The district court found the issue in favor of the plaintiff, and the judgment is sufficiently sustained by the evidence to make it our duty to affirm it, following the rule always enforced in such cases.

The position in which plaintiff left his money was unquestionably an act of negligence on his part, and if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant who were in charge of the car, he ought not to have had a recovery, because of his own negligence.

The fact, however, that plaintiff's negligence furnished the temptation and opportunity to defendant's servants to take

the money did not release it from its obligation to protect him against them.

The judgment is affirmed.

SLEEPING-CAR COMPANIES. — As to the rights, duties, and liabilities of sleeping-car companies, see *Pullman Palace Car Co.* v. *Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31, and extended note 34–36; *Williams* v. *Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512; *Pullman Palace Car Co.* v. *Ehrman*, 65 Miss. 383.

CASES

IN THE

SUPREME COURT

OF

VERMONT.

Barre Railroad Company *v.* Montpelier and Wells River Railroad Company.

[61 Vermont, 1.]

Railroads — Effect of Recording Location for Road. — A railroad company, by recording the surveyed location for its road, acquires a prior, vested, and exclusive right to build on the line of location, as against another railroad company which subsequently purchases the land on such location, or which, having previously purchased or agreed to purchase such land, has not recorded its conveyance or agreement of purchase.

Railroads. — Side-tracks Extended from the Main Line of a Railroad onto the lands adjoining the surveyed limits of the road as located, under a parol license from and agreement with the land-owners, but without acquiring title to the land, are a part of the main line, and, as to them, the same rights are conferred upon the company and the same obligations imposed as exist as to the main line. The right to prevent another railroad from crossing the side-tracks is good, under such license, until the latter is revoked.

Railroads — Right of One Road to Lay Track on the Lands of Another. — One railroad company has no right to lay its track on the land of another railroad company unless there is an absolute necessity therefor. That it would be a convenience so to do does not confer the right.

Petitions praying the appointment of commissioners to determine the points of connection and crossings for the railroads owned by the different parties to the suit.

S. C. Shurtleff, for the petitioner.

B. F. Fifield and George W. Wing, for the defendants.

VEAZEY, J. The decision of the contention between these two railroad companies, viz., the Barre company and the Granite company, as to which is entitled to build a railroad on the line of the recorded surveyed location of the Granite company on the Burnham meadow, depends upon the construction to be given to those statutes of Vermont which provide for the taking and condemnation of land for railroad purposes. Chapter 157, Revised Laws, provides that a railroad corporation may lay out its road, not exceeding five rods wide, and may purchase, or otherwise take, lands necessary for making its railroad; that it may cause such examination and surveys for the proposed railroad to be made as are necessary to the selection of the most advantageous route, and may enter upon lands of a person for such purpose; that before it commences proceedings for the purpose of acquiring title to real estate, or an interest therein, it shall cause the location of its road, signed by a majority of its directors, defining the courses, distances, and boundaries of the same in each town through which it passes, to be recorded in the respective town clerk's office of said towns. Then follows section 3359, Revised Laws, which provides that "when a railroad corporation has not acquired, by gift or purchase, land, real estate, or property, taken or required for the construction of its road, and if the parties do not agree as to the price of such lands and other property," two judges may appoint commissioners to determine the damages, etc. Under the provisions of section 3364, it is upon the payment of the damages, or deposit of the same, as therein specified, that the company is "deemed to be seised and possessed of the land" appraised by the commissioners.

On the 9th of April, the Granite company, having previously completed its surveys for its proposed railroad, caused the same to be recorded as provided in the sections of the statutes alluded to, and thereafter proceeded with due diligence to have the damages to the owner of the Burnham meadow, as the same appeared in the land records of Barre, across which the surveyed location extended, appraised by commissioners, and deposited the amount pursuant to the statutes.

On the 10th of April, the next day, the Barre company took a deed of substantially the same land from the owner, Mr. Burnham, which the Granite company had thus located upon.

This deed was taken in fulfillment of a written agreement of Burnham to sell to one Morse, in trust, for the Granite com-

pany, "any land necessary for the construction" of its proposed railroad; and it was taken before the Granite company had obtained an appraisal of land damages and deposited the amount thereof. This written agreement to sell was not recorded, and the Granite company had no notice of it before the recording of its survey.

Many other facts appear in the commissioner's report. The foregoing is perhaps sufficient in order to make the claim of the respective companies plain; which is, that each obtained priority of right to the same land for its railroad.

The Barre company says,—1. That its purchase of land was prior to the recording of the Granite company's survey, and this by virtue of the said contract to sell; and 2. That if subsequent, it is sufficient, because it was before the Granite company had paid or deposited the land damages, and so became entitled, under the statute, to the seisin and possession of the land.

The Granite company says that, having taken the statutory initial step to obtain seisin and possession, and continued, with reasonable diligence, about which no question is made, it could not be ousted by the Barre company's subsequent purchase, and insists that the purchase must be treated as subsequent.

The question is new in this state. It has been decided in other states, and always, so far as the cases show, which counsel have submitted or that I have found, in favor of the Granite company's contention. A late case is *Rochester etc. R. R. Co.* v. *New York etc. R. R. Co.*, 110 N. Y. 128, decided by the court of appeals of New York in June, 1888, and it was there held that when the initial steps pointed out by the statute were taken, there only remained for the company to acquire, through purchase or through proceedings *in invitum*, the right of way over the lands through which the line of route had been surveyed. The initial steps which the New York statute provided were the making and filing of a map and profile of the route intended to be adopted, and giving certain written notice to all occupants of the land affected.

The court then said: "Clearly, there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. This right to

locate its line of road, at its election, is delegated to the corporation by the sovereign power; as is the right subsequently to acquire, *in invitum*, the right of way from the land-owner. When, therefore, a corporation has made and filed its map and survey of its line of route it intends to adopt for the construction of its road, and has given the required notices to all persons affected by such construction, in our judgment it has acquired the right to construct and operate a railroad upon such line, exclusive, in that respect, as to all other railroad corporations, and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects, and without violating the obvious intention of the legislature."

The decisions in New Jersey and Pennsylvania, and other states, have been the same. Indeed, I have not found, and do not think there is, a judicial decision or utterance to the contrary. In Pierce on Railroads, 157, the author says: "The prior right to particular land attaches to the company which first actually surveys and adopts the route, and files its survey according to law"; see also 2 Wood's Railway Law, sec 237, p. 744, note 1, and p. 750. The numerous authorities touching this question are there cited by these authors.

But it is said that where this rule has obtained, the land-owner can recover his damages as soon as the location is made and recorded, which is not the rule in this state. This is true in some states, and may be in all where the courts have held as above shown; but in no instance have I found this fact alluded to as a reason for the ruling. In no case is it held that this initial step constitutes a right to the land as against the owner. In all the states there are further provisions, as in our state, for the appraisal proceedings, and completing the establishment of the right to the land. The filing and recording of the survey is nowhere spoken of as other than the initial step to the obtaining of the ultimate right. The right of the railroad company thereunder is no greater, as against the land-owner, in those states where the land-owner may proceed to enforce his claim for damages upon filing and recording the survey than in our state. The reason for the ruling is expressed in the quotation, *supra*, from the New York case first cited, viz., the legislative intent. Under its

franchise, the railroad company may select its location between the terminal points. The location can be determined only upon careful examination and expensive surveys. And then the statute prescribes that this must be recorded in the respective town clerks' offices before the company may commence proceedings for the purpose of acquiring title to the land, or an interest therein. Those proceedings necessarily extend over several days. Can it be fairly inferred that the legislature intended by the provision for record that it should have no protective power as against another railroad company stepping in and buying the very land thus selected, and thereby thwart the action thus taken, and practically get the benefit of the expense incurred? Such construction could serve no beneficial purpose, but would tend to promote confusion, strife, and the seeking of undue advantage. It is to be kept in mind that the question here is not between the railroad company and land-owner, but between the two railroad companies.

In such a controversy, it has been repeatedly held, as before stated, that when this initial step has been taken pursuant to the statute, the company first taking it has acquired a vested and exclusive right, not to the land, as against the owner, but to build its railroad on the line which it has adopted, subject to the right of other roads to cross. It is a right which undoubtedly might be lost by neglect to follow up the first steps with proper diligence; but that question is not here.

We therefore hold that the Granite company obtained the prior right to build on its recorded location, as against a subsequent sale of the same land to the Barre company.

Was the sale in this case prior or subsequent?

The deed of conveyance was subsequent, but the contract to sell was prior. At the time the contract was executed, February 22, 1888, the Barre Railroad Company had not been created. This did not occur until April 9, 1888, the same day that the Granite company filed its surveyed location in the town clerk's office; but it was earlier in the day. But on said 22d of February, certain gentlemen were "considering the matter" (quoting from the report) of organization, and the building of a railroad; and on that day W. N. Burnham executed the contract containing this provision: "I hereby agree to sell and convey to A. D. Morse, in trust, for said railroad company, any land necessary for its construction which I

own." It contained a further promise to execute a deed. when requested, on presentation of a certificate of the stock of the company, which he was to take in payment.

The report does not state how much land he owned, or where it was, except the Burnham meadow. It is not stated how large that was, but it appears, from the plans in the case, to be a meadow of some extent.

As before stated, this contract was not put on the public land records, or known to the officers or agents of the Granite company. The general and comprehensive terms of the agreement will be noted, "any land . . . . which I own"; thereby making, if valid, a possible bar to any other railroad company obtaining a right on Burnham's land. Suppose that Mr. Burnham had, notwithstanding his agreement with Mr. Morse, conveyed to the Granite company the same land that it located upon, then, under the law as to our registry system, it would hold the land as against this agreement. Why should there be any distinction between its right under a location made pursuant to the statute and a purchase? It is argued that if the Granite company had no notice of the agreement, it was not thereby injured. How can that be said, when that company have made these preliminary examinations and surveys upon Mr. Burnham's land, and caused the same to be recorded, and shaped their whole line in that vicinity with reference to crossing his land in the place selected? This was all done, and the expense incurred, in reliance upon the records showing the true title. We think that when a railroad company has completed its preliminary examinations and surveys, and selected its location between the terminal points, and is ready to have the same recorded, as the statute provides, it may have the record made in the same reliance upon the land records as to title that would pertain to it or any other person who should buy the land.

The next question arises under the claim of the Barre company to build its road across the side-tracks of the Montpelier and White River company, in the granite-yard, so called. The findings of the commissioners are conclusive against this claim, unless that company has the same right to run through the yards of the stone dealers as it would have if the three spur roads, which the Montpelier and White River Railroad Company have built from its main line to the derricks and sheds of the several dealers in granite, were not there.

There are no express provisions in the charter of this com-

pany, or in the general railroad statutes, granting the right to extend side-tracks from the main line onto the lands adjoining the surveyed limits of the road as located, except such right as impliedly exists under section 3358, Revised Laws.

That section reads: "No land without the limits of its road shall be taken by a railroad corporation for the requisite and convenient accommodation of its road without permission of the owner thereof, unless the commissioners, on the application of the corporation, and after twelve days' notice to the owner, first prescribe the limits within which such land shall be taken."

The three side-tracks which the Barre company desire to cross were built several years ago, under an arrangement between the railroad company and the granite dealers that the latter were to do the filling and grading, and the railroad company was to furnish and lay the ties and iron. This arrangement was not in writing, and the railroad company has no title to the land by deed or by the exercise of eminent domain. The title was and has remained in the granite dealers, for whose convenience, together with that of the railroad company, these spurs were built. They have been used as designed ever since. The yard in which the granite-sheds are located, and on which these side-tracks are built, lies adjoining next west of the railroad and depot at Barre, which was the terminus of the railroad. The report states that these side-tracks were there built as they seemed to be required.

It appears that this railroad, as a whole, was built with reference, in large measure, to the granite industry in Barre. It is plain that, to meet the demands of that industry, extensive yard-room at or near the station and heavy machinery was required. The railroad company could have taken whatever land was necessary for depot accommodations, having reference to the nature of its business as there existing: Sec. 3357. The necessity of extending the railroad grounds and erecting a derrick and other facilities for this business was obviated by the above arrangement with the granite dealers. The question whether a railroad can, under our statutes, and without express grant, build side-tracks or spurs as they please to neighboring manufacturing or mining establishments, is not here involved. This is a case where parties located themselves by the railroad near the depot, and obtained the best service of the railroad by having side-tracks run onto their own premises, instead of other land, or elsewhere.

In *Bangor etc. R. R. Co.* v. *Smith*, 47 Me. 46, the court says: "We have no doubt that a railroad corporation may lay side-tracks for the purpose of facilitating its business operations, or to meet its necessities, over any land which it may purchase and own in fee, or over which it may obtain the legal consent of the owner to lay a track, if no public interest or private right is affected."

These side-tracks were not mere private ways outside of the principal road. They connected with it, and were used as a part of it, and the people who had occasion for the transportation of the granite product and other material to and from these sheds, over those spurs, were interested in them. The public, as the term is used in law in such connections, enjoyed a beneficial use of these roads. It was lately held by this court, in *Brock* v. *Town of Barnet*, 57 Vt. 172, that a way laid out for one individual's convenience was yet a public way. So in *Sherman* v. *Buick*, 32 Cal. 241, 91 Am. Dec. 577, it was held that roads leading from the main roads to the farms of individuals are of public concern. They are open to every one having occasion to use them, and are therefore public. The business of these granite dealers was with the public in a large sense.

We do not put this point upon any general right of the Montpelier and White River Railroad Company to build side-tracks to manufacturing establishments outside its location, across land of parties objecting, whatever that right may be, but upon the ground that this company only obtained, by contract with the adjoining owners, who were its customers, that which was required for the convenient accommodation of the road, as contemplated in section 3358, to the great advantage of all concerned, without infringing any public interest or private right. It was, in substance, a more convenient equivalent of a necessary enlargement of depot accommodations.

We therefore hold, upon the facts now appearing, that these tracks became a part of the railroad, conferring the same rights upon the company, and imposing the same obligations, as the main line.

It is urged that this is not so, because the license to the railroad company by the land-owners is revocable. Suppose it is, which we do not decide because the question is not raised by the case, no revocation having been attempted, we still think that is no test of existing right. Suppose the main line had been built across some farm by the license of the owner, which

he could revoke, but never had revoked, would that piece of the road stand any different, as against the claim of another railroad company, from what the other parts of the road would stand? A license, though revocable, is as good, as against a third party, as though not revocable until it is revoked: 2 Woods on Railway Law, sec. 211, p. 608, and case cited.

The right of the court to prohibit the Barre company from crossing these side-tracks is not denied, if they stand the same in legal right as the main line.

The law, as we hold it, and the facts reported, place an absolute bar to the crossing of these side-tracks leading to the granite-sheds by the Barre railroad. As to the other crossing by the Barre company, no question is made but that the company is entitled to cross at the point marked on the map or plans on file.

The remaining question arises on the claim of the Barre company to take 360 feet in length of the land of the Montpelier and White River company, for the purposes of its track.

It appears that this would be a convenience to the Barre company, but it is not necessary to it.

The law is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms, or by necessary implication: *Boston etc. R. R. Co.* v. *Lowell etc. R. R. Co.*, 124 Mass. 368; Pierce on Railroads, 155, note 4.

The commissioners have not reported any facts showing a necessity for the Barre company to lay its track upon the land of the Montpelier and White River company. The only suggestion in argument is, that it would enable the former company to avoid a sharp curve, in the event that it is allowed to build its road as it has proposed, through the yard of the granite dealers. The proposition of law involved is so well established, and the facts reported fall so far short of the requirements in order to grant the relief sought, that more extended discussion of the point is not warranted.

This disposes of the questions argued.

An order was filed pursuant to the above views covering the points discussed, and others not disputed.

RAILROADS. — As to the rights of a public corporation in the property of another public corporation, taken through condemnation under the power of eminent domain: Note to *Appeal of Sharon R'y Co.*, 9 Am. St. Rep. 137–147; *Appeal of Pittsburgh Junction R. R. Co.*, 122 Pa. St. 511; 9 Am. St. Rep. 128; *Toledo etc. R'y Co.* v. *Detroit etc. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875; *Fulton* v. *Railway Transf. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619; *Grand Rapids etc. R. R. Co.* v. *Grand Rapids etc. R. R. Co.*, 35 Mich. 265; 24 Am. Rep. 545, and note; *Eastern R. R. Co.* v. *Boston etc. R. R. Co.*, 111 Mass. 125; 15 Am. Rep. 13; *Baltimore etc. Turnpike Co.* v. *Union R'y Co.*, 35 Md. 224; 6 Am. Rep. 397.

RAILROADS — EMINENT DOMAIN. — One railway company cannot, without express statutory authority, acquire for its own use property already acquired by another railway company: *Alexandria etc. R'y Co.* v. *Alexandria etc. R. R. Co.*, 75 Va. 780; 40 Am. Rep. 743, and note. The dominion of a railway company over its right of way and other property is as exclusive as that of any owner over his own property: *Fluker* v. *Georgia R. R. & B. Co.*, 81 Ga. 461; 12 Am. St. Rep. 328; *Troy etc. R. R. Co.* v. *Potter*, 42 Vt. 265; 1 Am. Rep. 325; *Rochester etc. R. R. Co.* v. *New York etc. R. R. Co.*, 110 N. Y. 128.

ST. JOHNSBURY AND LAKE CHAMPLAIN RAILROAD COMPANY *v.* WILLARD.

[61 VERMONT, 134.]

RAILROADS — ESTOPPEL ARISING FROM PERMITTING MORTGAGE, UPON LANDS OVER WHICH A RAILWAY IS CONSTRUCTED, TO BE FORECLOSED. — Where a railroad company has constructed and operated its road across mortgaged premises with the consent of the parties, and has been made a party to the foreclosure of the mortgage, it cannot, in an action to condemn the land for railroad purposes, set up an adverse title to a part of the premises acquired by it while they were mortgaged, as such title might have been litigated in the foreclosure suit.

RAILROADS — EMINENT DOMAIN — TRESPASS. — A railroad company which enters upon land with the consent of the owner or mortgagor, and, without objection from any one, constructs and operates its road for fifteen years without acquiring title to the land, or paying land damages, or making any arrangement in respect thereto, does not thereby constitute itself a trespasser as to the mortgagor or owner, and the latter is not entitled to the improvements or their value as damages, but only to actual compensation for the land taken.

PETITION to appoint commissioners to assess land damages for railroad purposes. Judgment for the defendant for sixty dollars, and he excepts.

A. J. Willard, pro se.

S. C. Shurtleff, for the petitioner.

ROWELL, J. In 1869 Trudell mortgages to Brown. In 1871, the mortgage being overdue, but the mortgagor being

still in possession, the Essex County Railroad Company, by virtue of some arrangement with the mortgagor, the terms of which do not appear, and with the knowledge of the mortgagee, but, as far as appears, without any agreement with him, enters upon the land in question, and surveys, locates, and constructs its railroad across the same, and puts it in operation. In 1864 Hovey is in adverse possession of three and one quarter acres of the five and one quarter acres in question, parcel of the mortgaged premises, and continues in such possession until he thereby acquires title thereto, which title he conveys to the Essex County Railroad Company; all which is after the execution of the mortgage, and before the St. Johnsbury and Lake Champlain company succeeds to the rights, title, and privileges of the Essex County company, on July 1, 1880, and goes into the possession and operation of the road. In 1883, the defendant becomes the owner of the mortgage, and forecloses it against the mortgagor and the St. Johnsbury and Lake Champlain company, and obtains a final decree in December, 1884, and is put into possession in February, 1886, by virtue of a writ of possession, whereupon the St. Johnsbury and Lake Champlain company brings this petition to condemn the land.

No question is made in argument as to the validity of the original mortgage in respect to the three and one quarter acres, on the ground that at the time of the execution of the mortgage they were in the adverse possession of Hovey, but the question of the defendant's right to damages therefor is left to stand upon the effect of the decree irrespective of that consideration; and the question is, Does that decree, excluding that consideration, estop the petitioner from now setting up the title acquired from Hovey? The petitioner does not really claim that it does not. It certainly does if the validity of that title could have been litigated in the foreclosure suit. And it could have been; for as the original validity of the mortgage as to this land is not questioned, the case stands in this behalf, and perhaps would stand any way, like the ordinary case of a title acquired after the execution of a mortgage that extinguishes the mortgage lien, and such title may be the subject of adjudication in a suit to foreclose: *Wilson* v. *Jamison*, 36 Minn. 59; 1 Am. St. Rep. 635, with note.

The remaining question relates to the amount of damages.

The defendant claims that inasmuch as his decree became absolute, it was effective to give him the title to the *corpus* of

the railroad itself, and that in this proceeding he is entitled to its value as damages, as well as to the value of the land taken for its construction. He also claims that the Essex County company was a trespasser when it entered and constructed its road, and invokes the doctrine of the common law, that structures placed upon land by a trespasser inure to the benefit of the owner of the land.

But the company was not a trespasser as to either the mortgagor or the mortgagee. Not as to the mortgagor; for he consented to the entry and construction of the road. Not as to the mortgagee; for as to third persons, a mortgagor in possession is regarded as the owner, and the mortgagee as having only a lien or security: *Cooper* v. *Cole*, 28 Vt. 185.

The effect of the decree of foreclosure was to cut off the right of redemption, and thereby convert defendant's conditional title into an absolute title; but in other respects the rights of the parties were left to be determined by the deed: *Carpenter* v. *Willard*, 38 Vt. 9.

Hence, as far as defendant's title is concerned, the case stands as it would had the mortgage been an absolute deed when it was given, with the mortgagor's consent to entry and construction effective to shield the company from being a trespasser as to any one.

It comes to this, then. A railroad company, instead of exercising its right of condemning land for its road, enters upon it by consent of the owner and constructs its road, but never acquires title nor pays for the land damages, nor makes any agreement in respect thereto, and with matters standing thus, operates its road for more than fifteen years without objection by any one, and now for the first time institutes proceedings to have the land condemned to public use.

In the circumstances it is clear that the owner is not entitled to the improvements, and cannot have their value as damages. He has no claim in justice to have expenditures for such a purpose inure to his benefit. He is entitled to be paid the damage he has sustained, and nothing more. The maxim, *Quicquid plantatur solo, solo cedet*, does not apply. That maxim has always had exceptions, and they increase with the ever-varying necessities and exigencies of society.

The improvements in question were made for a public use by one lawfully in possession, with the right to condemn to such use at any time; and herein lies the distinction between this case and *Price* v. *Weehawken Ferry Co.*, 31 N. J. Eq. 31, relied

upon by the defendant. In that case the company had no right to take the land on compensation, and the court said that therefore the maxim above referred to applied, but said it does not apply when the right to take exists: *North Hudson R. R. Co.* v. *Booraem*, 28 Id. 454; *Justice* v. *Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; and *Jones* v. *New Orleans and Selma R. R. Co.*, 70 Ala. 227.

Judgment reversed, and judgment for the defendant for $125, and interest thereon from July 1, 1880, the time when the petitioner took possession.

ESTOPPEL — FORMER ADJUDICATION. — Judgments are conclusive between the parties, not only of such matters as were in fact determined in the proceeding, but of every fact which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation: *Denver City etc. Co.* v. *Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234, and note; note to *Gould* v. *Sternbury*, 15 Id. 142.

TRESPASSERS. — One entering upon land in good faith and believing he has title thereto is not a trespasser. He is entitled under such circumstances to his improvements: *Mississippi etc. R. R. Co.* v. *Devaney*, 42 Miss. 555; 2 Am. Rep. 608. Right to dig ore from another's land by authority of a license from the owner exempts one from an action of trespass, so long as the license is not revoked: *Riddle* v. *Brown*, 20 Ala. 412; 56 Am. Dec. 202. Plea that an entry was under license from the real owner is a good defense to an action of trespass for breaking a close and carrying away grain: *Rasor* v. *Qualls*, 4 Blackf. 286; 30 Am. Dec. 658. Where a licensor sues in trespass, the licensee may always justify under the license by specially pleading it: Note to *Rerick* v. *Kern*, 16 Id. 504.

REDFIELD *v.* GLEASON.

[61 VERMONT, 220.]

CONTRACTS — PAROL EVIDENCE TO VARY. — Parol evidence is admissible to to show that, at the time of the execution of a written contract, a parol agreement was entered into by the parties and made a part of it.

SPECIFIC PERFORMANCE WITH PAROL VARIATION WITHOUT CROSS-BILL. — Where specific performance of a written agreement is demanded, and parol evidence is admitted to prove a contemporaneous oral agreement alleged in the answer, and varying the written contract, the court may decree specific performance of the contract with the parol variation, upon the allegations in the answer, without requiring a cross-bill.

PARTNER'S RIGHT TO COMPENSATION FOR CLOSING BUSINESS AFTER DISSOLUTION. — A partner claiming compensation for personal services, and for closing the business after dissolution of the partnership, must show that he performed a greater amount of labor than his partner, to enable him to recover.

CO-TENANCY — RIGHT OF CO-TENANT TO COMPENSATION. — A co-tenant is not entitled to compensation for his services in managing or taking care of the common property, except as the result of an express or clearly implied agreement to that effect between the parties.

BILL for specific performance, alleging that plaintiff and defendant were the owners as tenants in common of certain premises known as Riverside; that upon a certain day a written agreement was entered into by the parties, whereby plaintiff agreed to sell to defendant his interest in such property for a stipulated sum to be paid in certain ways; that plaintiff had always been ready and willing to perform his part of the agreement, while defendant had at all times refused to perform his part thereof. The defendant answered, and admitted the execution of the agreement, but alleged that he and plaintiff had been partners, and that, at the time of the execution of the agreement, such partnership was unsettled between them; that upon its settlement, a large sum would be due defendant, and that it was agreed at the time, and as a part of the written agreement, that such sum should be applied upon such written contract; that the partnership was dissolved at a certain time, and that soon thereafter the plaintiff abandoned the premises, and that defendant remained in possession and managed the property ever since. Parol evidence substantiating the allegations in the answer was received, over the objection of plaintiff. Defendant presented four items against plaintiff, which are set out and explained in the opinion. The bill was dismissed, and the plaintiff appeals.

J. A. Wing and W. W. Heaton, and J. W. Lucia, for the plaintiff and appellant.

Hard and Cushman, for the defendant.

TAFT, J. 1. The authorities in this state — *Taylor* v. *Gilman*, 25 Vt. 411, and *Adams* v. *Smilie*, 50 Id. 1 — justified the ruling of the master in admitting the parol testimony offered by the defendant to show that, at the time of the execution of the written contract, it was agreed by parol that, upon a settlement of their accounts, the balance due the defendant should be applied upon the purchase price of the Riverside property.

2. The orator insists that if parol evidence was properly admitted the defendant cannot have relief without a cross-bill, and that, even under a cross-bill, partnership claims cannot be set off against the price of the Riverside property. This is a

suit for the specific performance of a written contract; the defendant sets up in his answer a verbal stipulation entered into at the time of the execution of the contract, and as a part of it. The case, in respect of the objection named, comes clearly within the rule stated by Pomeroy in his work on equity jurisprudence, section 860, viz.: "If the plaintiff alleges a written agreement, and demands its specific performance, and the defendant sets up in his answer a verbal provision or stipulation, or variation omitted by mistake, surprise, or fraud, and submits to an enforcement of the contract as thus varied, and clearly proves by parol evidence that the written contract, modified or varied in the manner alleged by him, constitutes the original and true agreement made by the parties, the court may not only reject the plaintiff's version, but may adopt that of the defendant, and may decree a specific performance of the agreement with the parol variation, upon the mere allegations of the answer, without requiring a cross-bill." It is nothing but the enforcement of a single contract, and upon principle a cross-bill would be unnecessary and out of place.

3. Several questions arise upon the master's report in reference to certain charges of the defendant for personal services in caring for the property owned by him and the orator jointly, and closing up their partnership business. The defendant charged five hundred dollars for his services in settling up the partnership business, rendered after the dissolution. The master reports that there was not sufficient evidence as to the amount of labor performed by him in excess of the orator's to enable him to make any finding on this item. If he performed no more labor than the orator did in the same matter, he is not entitled to any allowance. He fails to show that fact, and the item was properly disallowed.

4. As to the items of five hundred dollars for services in building Riverside, two hundred dollars for the care of it after its construction, and supervising alterations in it, and one hundred dollars for services in collecting the Brigham notes, it is necessary to consider the relations of the parties in respect to this property. It was not strictly partnership property in respect to which their partnership had been dissolved. Their copartnership embraced simply the practice of the law, and ceased before Riverside was built, and the Brigham notes were purchased as an investment, whether with partnership funds or not does not appear; but neither the ownership of

the Riverside nor the Brigham notes were within the scope of the partnership business; they were joint owners, tenants in common of the property, and their right to charge each other for their personal services in the care of their joint property must be governed by the well-known rules applicable in such cases. Freeman on Cotenancy, section 260, states the rule as follows: "Compensation for his services in managing or taking care of the property is never awarded to a co-tenant, except as a result of a direct agreement to that effect, or unless, from all the circumstances of the case, the court is satisfied of the existence of a mutual understanding between the parties that the services rendered by one should be paid for by the others. In this respect, the law of co-tenancy is like that of partnership. A partner in taking care of and managing the property of the concern is performing no more than his duty, and is therefore entitled to no compensation from his partners." And the exception to this rule is where one co-tenant performs services which neither the law nor his partnership obligations nor the relation of co-tenancy imposed upon him: *Fuller* v. *Fuller*, 23 Fla. 236; *Lewis* v. *Moffett*, 11 Ill. 392; *Levi* v. *Kerrick*, 13 Iowa, 344; and see numerous cases cited in Freeman on Cotenancy, sec. 260. These items should not be governed by the law relating to the services performed by a partner after the dissolution of a firm. Applying the rule above stated to the items under consideration, it is clear that the defendant should be allowed the item for superintending the construction of Riverside. It was agreed that he should perform the services, and that the orator should do what was right about it; it must have been the mutual understanding of the parties that the defendant should be paid, and the master properly allowed the item. It is equally as clear that the items for the care of Riverside and the Brigham notes should be disallowed. The orator never agreed to pay for the services, and the defendant performed none except such as were required of him as a co-tenant; rendered none except such as were imposed upon him by law; such as renting the property, looking after the repairs, collecting the rents, notes, and other like duties.

5. The orator never paid the item of fifty dollars charged by him for expenses, on the occasion of an interview with Smith Ely in the city of New York. The master properly disallowed it.

No other questions are insisted upon by the parties. The

orator, therefore, is entitled to a decree that, upon payment by the defendant of the sum of $1,559.97, with interest since the second Tuesday in September, 1886, within such time as may be fixed by the chancellor, the orator shall convey to the defendant, free from encumbrance, an undivided half of the Riverside property, described in the bill, and in default of such payment, the orator to have a decree according to the prayer of the bill.

Decree reversed, and cause remanded, with mandate.

PAROL TESTIMONY TO VARY CONTRACTS. — As to when oral evidence can be admitted of contemporaneous agreements made when a contract was reduced to writing: Note to *Sullivan* v. *Lear*, 11 Am. St. Rep. 394; note to *Appeal of Cornwall etc. R. R. Co.*, 11 Id. 893, 894; note to *Palmer* v. *Farrell*, *ante*, pp. 713, 714.

PARTNERSHIP. — A surviving partner is not ordinarily entitled to compensation for his services in winding up the affairs of the partnership: Note to *Shields* v. *Fuller*, 65 Am. Dec. 301; *Brown* v. *McFarland*, 41 Pa. St. 129; 80 Am. Dec. 598; *Barry* v. *Jones*, 11 HeisK. 206; 27 Am. Rep. 742. But in *Robinson* v. *Simmons*, 146 Mass. 167, 4 Am. St. Rep. 299, it was held that a surviving partner was entitled to compensation for his skill and services out of the profits earned by his deceased partner's capital, which he continues to use in the business, with consent of all the heirs, in good faith, and with due regard to the interests of all concerned.

CO-TENANCY. — *Assumpsit* cannot be maintained by one tenant against his co-tenants to recover for services rendered by him with respect to the common property: *Hamilton* v. *Conine*, 28 Md. 635; 92 Am. Dec. 724.

COMMERCIAL UNION TELEGRAPH COMPANY *v.* NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

[61 VERMONT, 241.]

TELEPHONE COMPANIES ARE COMMON CARRIERS OF SPEECH FOR HIRE, and bound to serve all persons and corporations alike, upon their tender of equal pay for equal service, and compliance with the company's reasonable rules and regulations, notwithstanding an agreement between them and the patentee and licensor that the use of the telephone is to be restricted to a portion of the public.

CONTRACT RESTRICTING USE OF TELEPHONE VOID. — A contract between the patentee and licensor of the telephone and telephone companies restricting the use thereof to certain portions of the public is void.

PETITION in *mandamus* upon an agreed statement of facts.

Wilson and Hall, for the relator.

Wales and Wales, for the defendant.

TYLER, J. This case was heard on the bill, answer, and an agreed statement of facts.

The relator and the defendant are corporations chartered and existing under the laws of the state of New York. The former, as a telegraph company since January, 1887, and the latter, as a telephone company since January, 1886, have been doing business in this state in compliance with its laws, with offices in the town of Rutland. The defendant, for certain fixed and uniform prices, had placed its telephones in public and private buildings and places of business in said town, and connected them with its central office. It had also connected the Western Union Telegraph Company with its central office, so that the latter company and its patrons, at the date of this petition, enjoyed all the privileges and profits to be derived from such connection. In February, 1888, the relator requested the defendant to place a telephone in its office in Rutland, and connect the same with its central office, and to grant to the relator and its patrons the privileges accorded to others, tendered to the defendant payment for such use and service, and offered to comply with all reasonable rules and regulations of the defendant company. The latter refused this request, for the reasons stated in its answer, and specifically set forth in the exhibits A and B, except on the conditions mentioned in exhibit B.

The defendant is the licensee, by contract A, of the American Bell Telephone Company, a corporation created by and existing under the laws of Massachusetts. It is provided in said contract that no office or line of the defendant can be connected with any telegraph-wire except by lines of the licensor or parties specially designated by it for this purpose, and that no telegraph company, unless specially permitted by the licensor, can be a subscriber of the defendant, and so entitled to the use of its telephone; that the licensor, in and by said contract, reserved to itself the exclusive right to build and to have built all lines connecting the various offices of the defendant with telegraph offices, and the right to operate such connecting lines, and further reserved the title and ownership of all lines which should be built connecting the offices of said company with telegraph offices.

The contract further provides that in case of violation by the defendant of any of its terms and conditions, such violation shall, in the election of the licensor, after certain prescribed notice, work a forfeiture of all its rights under the contract, and subject the defendant to other serious loss and damage. The defendant claims in the answer that it is legally

prevented and restrained from connecting any of its offices with any telegraph company's office, and from allowing any telegraph company to become one of its subscribers, except by and with the special permission of the American Bell Telephone Company, its licensor, and that such permission, in this case, has not been given.

Said exhibit B contains the restriction that "they are not to be used for any toll or consideration to be paid by any person other than the subscriber, nor for furnishing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the exchange, nor for transmitting market quotations or news for sale, publication, or distribution, nor for calling messengers, except from the central office, nor for performing any other service in competition with service which the exchange may undertake to perform."

The Western Union Telegraph Company's office in Rutland, by an arrangement with the respondent and the American Bell Telephone Company, is furnished with a telephone, and connected with the central telephone and connecting lines, for the purpose of transmitting and delivering telegraph messages from the subscribers and other customers of the exchange at Rutland to the Western Union Telegraph Company, and transmitting messages from the latter company to such subscribers and customers for the consideration of two cents for each message so delivered by telephone. The Western Union Telegraph Company pays the respondent two cents for each message, and the American Bell Telephone Company fifteen per cent on all the tolls received for transmitting such messages over the lines of said Western Union Telegraph Company, of which fifteen per cent the respondent is to receive fifty per cent.

The relator claims that the defendant, having come into this state, and established a telephone system under our laws, erected its lines and a central office in Rutland, has become a public servant, a common carrier of speech for hire, and is bound to serve all persons and corporations alike upon their tender of equal pay for equal service, and a compliance with the defendant's rules and regulations. On the other hand, the defendant claims that its powers are restricted by the terms of its license; that its licensor, being the exclusive owner of its patents and property, had a right to grant to the defendant such limited use thereof as it pleased. The question here presented is not a new one. Counsel for the respective parties

have, with great diligence and fairness, brought together in their briefs all the decided cases in this country that can throw light on the subject.

The principle contended for by the relator has frequently been applied to railroads and other carriers of persons and freight. It was held in *Bennett* v. *Dutton*, 10 N. H. 481, that the proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal, and it is not a lawful excuse that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach.

In the case of *New Eng. Exp. Co.* v. *Maine Cent. R. R. Co.*, 57 Me. 188, 2 Am. Rep. 31, the defendant let to the Eastern Express Company, for four years, the exclusive use of a certain separate apartment in a car attached to each of its passenger trains for the purpose of transporting the express company's messenger and merchandise, and agreed that it would not, during the continuance of such contract, let any space in any car on its passenger trains to any other express carrier, and the defendant, before the expiration of such contract, but after reasonable notice, refused to receive upon any terms from the New England Express Company such packages as are usually carried by express companies to be transported by its passenger trains. It was held that "common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered and all passengers who may apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. . . . . The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply. . . . . They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can, but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations." See also *Sandford* v. *Catawissa R. R. Co.*, 24 Pa. St. 378; 64 Am. Dec. 667.

In the case of *Southern Exp. Co.* v. *Memphis etc. R. R. Co.*, 8 Fed. Rep. 799, the complainant, an express company, had been for many years engaged in carrying on an express business over the defendant's railroad. No written contract was ever entered into between the parties, but the business was carried on without objection, and upon terms mutually satisfactory, until some time in the year 1880, when the defendant asserted its own right to transact all the express business upon its line, and attempted to eject the complainant therefrom. Upon the application of complainant, a temporary injunction was granted, and upon a motion to dissolve the same, McCrary, J., said that it was the duty of the defendant, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms; that railroad companies must carry express packages and the messenger in charge of them for all express companies that apply, on the same terms, unless excused by the fact that so many apply it is impossible to accommodate all.

The same was held in *Samuel* v. *Louisville & N. R. R. Co.*, 31 Fed. Rep. 57, were defendant discriminated against one of two rival lines of steamboats by charging it fifty cents a hundred more for freight than the other. Also, where a railroad company has established commutation rates for a particular locality and sold commutation tickets thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principles of equality which the company is bound to observe in the conduct of its business: *Atwater* v. *Del., Lack., & West. R. R. Co.*, 4 East. Rep. 186. In *McCoy* v. *C., I., St. L., & C. R. R. Co.*, 22 Am. Law Reg. 725, 13 Fed. Rep. 3, it was held that a railroad company was bound to transport over its road and deliver to all stock-yards at a certain point reached by its line all live-stock consigned which shippers desired to consign to them, upon equal terms, and in like manner, and it cannot bind itself to perform this duty for one to the exclusion of another and competing yard; and in *Hays* v. *Pa. R. R. Co.*, 22 Am. Law Reg. 39, Ohio, 1883, it was held that a railroad, though owned by a corporation, is, in a qualified sense, a public highway, constructed for public uses, and everybody constituting part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable

of affording. A discrimination in the rates of freight between the same points is unreasonable and unjust.

The same rule has been applied to gas-light companies. Where a citizen has made all necessary preparations to receive and use gas in his store or residence upon the line of a company's pipes, upon his compliance with the reasonable terms and rules of the company the latter is bound to furnish him gas: *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539; *People* v. *Manhattan Gas Light Co.*, 45 Barb. 137.

A case more directly in point is that of *Friedman* v. *Gold and Stock Tel. Co.*, 32 Hun, 4, where a suit was brought to restrain the removal of two instruments in plaintiff's place of business. It was held that the defendant, being a public corporation, could make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish, but owed the duty impartially to grant to all, who complied with its rules, the privileges furnished. See also *Smith* v. *Gold and Stock Tel. Co.*, 42 Id. 454, which was a suit brought to restrain the removal of "a ticker," or reporting instrument, maintained and operated by the defendant, and from doing or failing to do any act which would in any way interfere with the receipt by the plaintiff of the quotations of the New York Stock Exchange. The court in commenting upon the obligations of corporations to the public said: "These obligations do not rest on contract, but on the ground that when one is engaged in a business public in its nature, he must, if public policy requires, serve the public impartially."

The case of *State ex rel. Am. Union Telegraph Co.* v. *Bell Telephone Co. of Mo.*, 22 Alb. L. J. 363, was an application for *mandamus* to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its license from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. Thayer, J., said: "In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would-be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph, or

telephone company may avoid the performance of any part of the paramount duty they owe to the entire public, by contract obligations which they may enter into, even with the patentee of an invention."

In *Louisville Transfer Co.* v. *American District Tel. Co.*, 24 Alb. L. J. 283, the plaintiff was a proprietor of public omnibuses and carriages, and the defendant was a telephone company and also proprietor of public carriages. Upon an application by plaintiff for an injunction to restrain the defendant from removing its telephone from the plaintiff's office, and from refusing to transact its (plaintiff's) telephone business, pursuant to contract, the defendant insisted that a mere rival in one branch of its business could not force it to afford it facilities which it had provided for another branch of its business. The court said: "The real contention between the plaintiff and defendant is confined to their carriage and coupé service, the defendant insisting that, as against the plaintiff, a rival in that business, it has the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupés; that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business; . . . . that defendant is engaged in two distinct employments, —one in operating a telephone exchange, and the other in operating a carriage or coupé service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business, it occupies the same position toward the plaintiff that it does toward the rest of the public; that defendant is a *quasi* public servant, and, as such, is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carrier." In *Chesapeake etc. Tel. Co.* v. *Baltimore etc. Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167, the court, holding the same view, said: "The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. . . . . They have no power to discriminate, and while offering readily to serve some refuse to serve others."

A recent case, and one relied upon by the relator's counsel, is that of the *Baltimore etc. Telegraph Co.* v. *Bell Telephone Co.*, 24 Am. Law Reg. 573, which arose upon a state of facts nearly identical with those in the case at bar. Brewer, J., in giving the opinion of the court, from which Treat, J., dissented, said:—

"Now, the question is, whether the court can compel this defendant, doing the telephone business of this city, to establish communication with any other individual or company than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions. . . . .

"A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, 'My license is to establish a telephonic system open to the doctors and the merchants, but shutting out you, gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it puts itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

"So my conclusion is, that, notwithstanding the terms of this license, which seemed to inhibit it from dealing with or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges. The application for *mandamus* will be sustained."

The supreme court of Nebraska has rendered a similar decision in *State* v. *Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404. The same question was before the supreme court of Pennsylvania in *Bell Telephone Co.* v. *Commonwealth of Pennsylvania*, 7 East. Rep. 672, which contains a full review of the decided cases, and in which the same doctrine is held. See also *People ex rel. Postal Telegraph Cable Co.* v. *Hudson River Telegraph Co.*, 19 Abb. N. C. 466, decided in 1887.

The rule of law recognized in the foregoing cases does not in any wise conflict with section 4884 of the Revised Statutes of the United States, which in substance provides that every patent shall contain a grant to the patentee, his heirs or assigns, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, nor with the decision of the United States supreme court in *Gayler* v. *Wilder*, 51 U. S. 478, that the monopoly of making, using, and vending an invention or discovery, created by this statute, is all there is of a patent; that it is the power to exclude others from using the products of his labor without his consent which constitutes the whole property of a patentee. It is true that the owner may divide his right, conveying to one the right to make, to another the right to use, and to another the right to vend; that he may limit the time and the territory within which the subject of his patent may be used: *Adams* v. *Burke*, 84 Id. 453; *Mitchell* v. *Hawley*, 83 Id. 544; *Nicke* v. *Kleinkuecter*, 7 Off. Gaz. U. S. Pat. Off. 1098; *Gamewell Fire Alarm Telegraph Co.* v. *Brooklyn*, 14 Fed. Rep. 255. As to the right of the owner of a patent to limit the purpose for which it may be used, the case of *Pope Manufacturing Co.* v. *Owsley*, 27 Id. 100, is in point. There it was held that where a license does not purport to give an unlimited right to the use of the patent, but restricts the right to machines of certain descriptions, when the licensee makes machines not in conformity to his license, but within the patent, he not only violates his express covenant not to do so, but violates the patent.

These general principles of law are specially applicable to patents and patented articles designed for private use.

The case most relied upon by the defendant is *American Rapid Telegraph Co.* v. *Connecticut Telephone Co.*, 49 Conn. 352, 44 Am. Rep. 237, in which the facts are like those in the case at bar. After stating the grounds upon which the application for *mandamus* was claimed, which were the same as in this case, Pardee, J., said: "But the property of the American

Bell Telephone Company is absolute and exclusive; it can rent or sell it in whole or in part; it can refuse to make or use, or to allow any one else to make or use, the telephone described in it; or it can make and sell one, and no more, and put such restrictions as it pleases upon the time, place, and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or discriminate the purchase." The learned judge reasons that the position of the defendant, which, by its contract with the licensor, has only a limited right to the patent, is unlike that of a railroad company which undertakes to put limitations upon the use of property absolutely its own. But if this is correct reasoning, it follows that the licensor may discriminate between different classes of business men, and indeed between different men of the same class.

Patents are property, and the right to sell or lease them is subject to the same restrictions as other property. The patentee cannot lease them for any use that contravenes principles of public policy. If he leases them for a public rather than an individual use, he thereby gives the use to the whole public. In this case, the American Bell Telephone Company might have licensed its patent to the defendant so the latter alone could have used it; but when it went beyond this, and licensed the defendant to use it for the public, it in fact licensed it for all who desired its use and offered compliance with reasonable conditions.

The license, with the restrictive clause therein, cannot be regarded as the measure of the defendant's duty to the public. On grounds of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restrictive clause were not contained in it.

In the view of the case which we have taken, it seems unnecessary to make the Bell Telephone Company a party to these proceedings.

It is therefore ordered that a peremptory *mandamus* in the usual form issued out of this court, under the hand and seal of the clerk thereof, to the said defendant, the New England Telephone and Telegraph Company, commanding and requiring it, on payment to it by the relator, the Commercial Union Telegraph Company, of its usual and proper charges, and on

compliance with its proper rules and regulations, to place one of its telephone instruments, with the usual and proper wires and connections, in the relator's office in Rutland aforesaid, and to connect the same with its central office in said Rutland in such a manner that the relator, its patrons, and other persons wishing to transact business with the relator, may have the same benefits and privileges to be derived therefrom that are accorded to others who have and use the defendant's telephones.

TELEPHONES. — TELEPHONE COMPANIES ARE COMMON CARRIERS OF NEWS, and, as such, subject to regulations requiring them to conduct their business in a way conducive to the welfare and good of the general public: *Central Union Tel. Co.* v. *Falley*, 118 Ind. 194; 10 Am. St. Rep. 114, and extended note on the "law of the telephone" 128–136.

PEABODY *v.* LANDON.

[61 VERMONT, 318.]

CHATTEL MORTGAGE — POWER OF SALE. — A chattel mortgage, duly recorded, declaring that the mortgagor may remain in possession, and sell the mortgaged property as opportunity presents, the property as sold to be replaced with other of like kind and of sufficient value to keep the security of the mortgagee good, but not providing that the avails of sales shall be accounted for by the mortgagor, is *prima facie* valid as against an attaching creditor of the mortgagor.

CHATTEL MORTGAGE — POWER OF SALE — AFTER-ACQUIRED PROPERTY. — A recorded chattel mortgage providing that the mortgagor may sell the mortgaged property from time to time, replacing that sold with other of like kind and value, the substituted property to be subject to the terms of the mortgage, is valid, and where the mortgagee takes possession with the consent of the mortgagor, he can hold the property, original and substituted, as against a subsequent attaching creditor of the mortgagor.

TROVER for goods. Judgment *pro forma* for defendant. Plaintiff excepts.

J. C. Baker, for the plaintiff.

Charles H. Joyce, for the defendant.

Ross, J. This is an action in favor of the plaintiff, as assignee of Lee S. Houghton, against the defendant, to recover the avails of goods sold under a mortgage of personal property given by Houghton to the defendant. From the agreed statement of facts, it appears that, June 1, 1885, the defendant sold to Houghton a stock of goods, and took Houghton's four notes in payment to the amount of four thousand dollars, pay-

able in two, three, four, and five years from date, secured by a mortgage on the stock of goods sold. Houghton also rented the defendant's store in which to carry on the business. The mortgage describes the property conveyed as: "All the stock of boots, shoes, rubbers, slippers, and other stock of like description now on hand in the store, ... and all stock of a like kind hereafter purchased and placed in said store by me, and I hereby agree to make such further purchases, and keep said stock good to the amount of four thousand dollars from the receipts and avails of the sale of said stock hereafter purchased in the usual course of business. And I agree to keep said stock insured for the benefit of said grantee to the extent of his interest therein." There is a further stipulation that if said Houghton should fail to keep the said stock up to or insured for the required amount, the defendant might cause all the property to be sold as prescribed in the mortgage. Houghton went on selling from the stock purchased, with the knowledge and consent of the defendant, and continued to make new purchases, so as to keep the stock up to the required amount, making some of the purchases for cash, and some on credit, until December 1, 1887. In the mean time he had paid one year's interest on the notes, and one hundred and thirty dollars of the principal. One of Houghton's creditors, having a claim against him for about fifteen hundred dollars, sued out a writ of attachment against him, and placed it in the hands of the sheriff for service. Before this last was done, on the same day, without any knowledge of this creditor's action, so far as is shown, the defendant placed his mortgage in the hands of a deputy sheriff, with instructions to take possession of the stock of goods then on hand, and sell the same under the terms of the mortgage agreeably to law. The deputy sheriff at once took peaceable possession of the stock of goods, by the leave and with the consent of Houghton, and sold the goods according to the provisions of the mortgage, and of the statute. December 3, 1887, a petition in insolvency was filed against Houghton, which passed into judgment December 14, 1887, and the plaintiff was duly appointed the assignee of his estate in insolvency, and demanded the goods which the deputy sheriff had taken possession of. On invoicing the goods, it was ascertained that over one third of the goods were of the stock at the date of the mortgage, and that the others had been purchased after the mortgage was given, partly for cash, but mostly on credit. It did not ap-

pear how many of the goods were purchased for cash. The goods did not sell for enough, after deducting the expenses of the sale, to pay the mortgage debt due the defendant. Until 1878 a mortgage of personal property was not provided for by the statute law of the state. The present law was then passed authorizing the mortgage of all such property. This law provides that such mortgage shall not be valid against any person except the mortgagee and his representatives, unless possession of the property is delivered to and retained by the mortgagee, or the mortgage is recorded as therein provided by Revised Laws, section 1966. Each party to the mortgage is required to make oath that the debt specified is a just debt, and owing from the mortgagor to the mortgagee, and that the mortgage is given to secure the payment of the debt, and for no other purpose: Sec. 1967. The statute has provisions for recording and for foreclosing all such mortgages. There is no claim made that the mortgage was given for any other than the honest purpose of securing payment of the debt incurred by Houghton in purchasing the original stock of goods of the defendant. From the language of section 1966, it is apparent that it is the intention of the legislature to make the record of the mortgage, as there required, a substitute for taking and retaining possession of the goods conveyed by the mortgage. The statute contains well-guarded provisions against the removal of the goods from the state, and against their sale by the mortgagor, except by the consent of the mortgagee in writing indorsed upon the mortgage or its record. There is in this mortgage no express authority given by the mortgagee to the mortgagor to sell the mortgaged goods, but the mortgage contains an express provision against the pledge, sale, or mortgage of any of the goods mortgaged, without the consent in writing of the holder indorsed thereon. That the mortgagor shall not sell without such consent in writing of the holder of the mortgage indorsed thereon is in accordance with the provisions of the law: Revised Laws, sec. 1972. While the statute does not in terms declare that the mortgagee may, in the manner specified, consent to the sale of the mortgaged goods, or to some part thereof, and still hold his mortgage upon the unsold goods, such authority is fairly implied from the section last cited. It would be nugatory to provide for a sale with the written consent of the holder of the mortgage, if the giving of such consent discharged, *ipso facto*, the mortgage, or rendered it invalid in the hands of the holder. The mort-

gage was duly recorded, and the deputy sheriff proceeded duly in the sale of the goods. By the stipulation of the parties it is agreed that the court shall determine their rights in accordance with law, regardless of the form of action and pleadings.

On this state of facts, and of the statute law governing the execution of mortgages of personal property, the plaintiff makes several contentions.

1. He contends that the consent of the defendant to the sale of the goods by Houghton, without accounting to him for the avails of the sale, whether that consent is contained in the mortgage, by express terms or by implication, or was given by indorsement upon the mortgage in writing, or its record, as provided by the statute, rendered the mortgage, *per se*, fraudulent and void. In support of this contention he cites cases from several of the states, and one from the United States supreme court. All the cases so cited, and many more, with a general review of the law and decisions of courts of final resort, with the reasons in support of and against such contention, may be found in Pierce's work on mortgages of merchandise, published in 1884, and in Jones on Chattel Mortgages, second edition. The decisions in this country are quite numerous and conflicting. It would be needless to review the decisions after the careful and exhaustive work of these eminent law-writers. The most that we shall attempt will be to state briefly the results arrived at by each, and, as the question is for the first time presented to the consideration of this court, the reasons for the decision we have arrived at.

Mr. Pierce claims that the balance of authority in both state and national courts, as well as of reason and principle, is in favor of holding such mortgages fraudulent *per se*, and void. The foundation for this holding is found by the writer, and by the decisions adopting and enforcing it, in *Twyne's Case*, 3 Coke, 80. In that now celebrated case, Pierce was indebted to Twyne in four hundred pounds, and to C. in two hundred pounds. C. commenced an action on his debt. Pending this action, Pierce, who was possessed of goods and chattels to the value of three hundred pounds, in secret made a deed of all his goods and chattels to Twyne, in satisfaction of his debt, and yet continued in possession of the same, sold some of them, and marked the sheep with his own name. The deed to Twyne was held void, notwithstanding it was made for full consideration. The decision is based on the six resolutions promulgated by the court: 1. That the deed had the marks of fraud,

in that it was general, not excepting apparel, or anything of necessity; 2. The donor continued in possession; 3. It was made in secret; 4. It was made pending the suit; 5. There was a trust between the parties, for the donor was in possession, and used them; 6. It was contained in the deed that it was an honest and true transaction,—an unusual statement to be inserted.

The court conclude, for these six reasons, that the deed was fraudulent and void.

It is apparent that too much prominence has been given by certain courts to some one of these reasons as the controlling element of fraud in the sale or conveyance of personal property. It has been and is still held by this court that against attachment creditors, or *bona fide* purchasers, for value paid, without notice, a sale of personal property, unaccompanied by delivery and change of possession, is only valid between the parties; that to allow the vendor to retain possession gives him a false credit, and renders the sale invalid when attacked by an attaching creditor, or a *bona fide* purchaser, for value paid, as against public policy. This doctrine has been drawn from that decision in only a few of the jurisdictions which have adopted its principles. The great majority of courts of final resort which adopt the principles of that decision hold that the retention of possession is only evidence bearing on the question whether the sale is fraudulent and void; that inasmuch as possession usually accompanies the ownership of this class of property, such possession is *prima facie* evidence of such ownership, and if the property is found in the possession of a debtor, the creditor or purchaser without notice to the contrary has a right to assume that the debtor or vendor owns the property, and so the purchaser who has left such property in the possession of the vendor takes upon himself the burden to rebut this presumption of ownership. Because of the extreme view of this court in regard to the effect of the want of a change of possession, Mr. Pierce is inclined to count this state as favoring his views in regard to the effect of the Twyne case upon the validity of mortgages of personal property, when the possession is retained by the mortgagee, and the mortgagor has given him the power to sell the mortgaged property, either in the mortgage or otherwise. He admits that the retention of possession of the property is only evidence of fraud in the mortgage, in that it furnished a convenient opportunity for the mortgagor to use the property for his own

benefit. But this writer insists that when, besides possession of the property in the mortgagor, power is conferred upon him by the terms of the mortgage, or otherwise, to sell the property in his own name, and not as the agent, and on account of the mortgage, the mortgage is fraudulent *per se*, and void; and that it is the duty of the court to declare it void. He, with much reason and citation of authorities, contends that the determinative element of fraud contained in the six resolutions in *Twyne's Case*, *supra*, was vesting the proper title to the property in Twyne, while the possession and beneficial use of the property remained in its debtor; that the covering of the title by Twyne, through the deed, while the beneficial use of the property and the avails to be derived from its sale by the agreement, though secret, belonged to the debtor, made the transaction fraudulent *per se*, or such that it would necessarily hinder and delay creditors in the collection of their debts; that such conveyances are necessarily vicious and against public policy. There is much force in this contention if the power of the sale is general, or such that the mortgagor may both sell and use for his own benefit the whole property covered by the mortgage by a single transaction. Mr. Jones admits as much, but contends that the power of sale from a stock of goods, in the usual course of business, under an express stipulation to maintain the stock at a fixed value or more, does not authorize a sale of the whole stock by a single transaction, and that a deed accompanied with such a power is not *per se* fraudulent, and the court have no right to pronounce it fraudulent. We think there is much force in this contention by Mr. Jones. The power of sale, in such a case, is limited by the stipulation to keep the stock of fixed value. Both these writers admit that most of the statutes authorizing mortgages of chattels make the record equivalent to a change and retention of possession by the mortgagee. The record of the mortgage gives publicity to the transaction, and furnishes a place where all dealers with the mortgagor may learn its exact terms and provisions, and is constructive notice to them, at least of its terms and provisions. If they trust him thereafter, legally, they do it understandingly. If such mortgages, with such a power of sale, contain, in some sense, a trust beneficial to the mortgagor, the record legally removes its secrecy. Such mortgages, if accompanied with a power of sale of all the property by a single transaction by the mortgagor, without accountability to the mortgagee for the avails, are

not always nugatory in the sense that they furnish no security for the payment of the mortgagee's debt. While the mortgagee has to trust largely to the honesty and good faith of the mortgagor in such a case, he does not always trust in vain; neither is such a mortgage always or generally the result of a fraudulent intent between the parties. For this reason, Mr. Jones contends that, to avoid such mortgages, the fraudulent intent should always be established as a fact, and that the mortgage and its conditions, or the power of sale conferred *aliunde*, are to be considered in determining the intent of the parties. In most of the jurisdictions where this question has been passed upon, it is held that such a mortgage, with such a general power of sale, is valid, if the mortgagor is required by the terms of the mortgage to account to the mortgagee for the avails of the sale. It is to be observed that the mortgagee, in such a case, places the avails of the sale wholly within the power of the mortgagor, and must trust him, to a greater or less extent, to pay them over on the debt secured. Yet, with the general power of sale, the parties, when the mortgage is made honestly, intend the property conditionally conveyed as security for the payment of the debt, and use it for that purpose. There is no question in regard to the validity of such mortgages between the parties. It is contended that they should not be held fraudulent *per se*, and void, because such mortgages furnish a convenient opportunity to cover the property away from the other creditors for the benefit of the mortgagor, when they may be honestly intended and used to secure the payment of the mortgagee's debt in the most economical, and in such an inexpensive, manner as to save something for the other creditors, or at least for the mortgagor. It seems to us that, so far as controlled by public policy, the question is for the legislature rather than for the court, and that the fundamental error of Mr. Pierce, and the authorities which hold such mortgages fraudulent *per se*, and void, lies in assuming that the question is to be determined by the principles of the common law as propounded in *Twyne's Case*, *supra*, rather than by a fair construction of the provisions of the statute, and of public policy as indicated by the provisions of the statute. An examination of the various statutes of this subject shows quite a variety in their scope and provisions, which would naturally lead to a diversity in the decisions. From the provisions of the statute in this state, it is quite apparent that the record of the mortgage is intended to prevent secrecy, and take

the place of a change of possession of the property. It has never been held, so far as we are aware, that a pledge of personal property for the payment of a debt, accompanied with a change of possession to the hands of the creditor, and with a general power in the debtor to sell, was, *per se*, fraudulent and void. But such and all other transactions between a debtor and creditor, by which the property of the former is conveyed absolutely or conditionally for the payment of a debt due the latter, are open to the scrutiny and investigation of other creditors, and if found merely covers to delay and hinder the other creditors in the collection of their debts, are fraudulent and void. Under a statute which allows the mortgage of all kinds of personal property, but requires, for their validity against other creditors, a change to and retention of the possession of the property by the mortgagee, or that the mortgage should be recorded in a public office where it can be examined by all other creditors; which further requires that the debt secured shall be specified, and that the parties shall make oath to the existence of the debt, and that the mortgage is given to secure its payment, and for no other purpose; and which further impliedly provides that the mortgagor may, with the written consent of the mortgagee, indorsed on the mortgage, sell the property, we do not think it is the province of the court to test such mortgages by, and hold them fraudulent *per se* and void under, the principles and decisions of the common law, and against public policy, because, if the parties should commit perjury in making their oath thereto, such mortgage could be intended, and made the cover of the property for the benefit of the mortgagor, and so hinder and delay his other creditors. Mortgages executed under the provisions of such a statute we think should be held *prima facie* valid, and executed for the honest purpose of securing the payment of the debt specified, until the contrary is made to appear. They are capable of being used for the honest purpose specified in the oath of the parties. That they furnish an opportunity to defraud the other creditors furnishes no occasion for the court to adjudge them *prima facie*, much less conclusively, fraudulent, until it is established that the oath of the parties thereto is false, and that they were intended or have been used by the parties to hinder and delay other creditors in collecting their debts. If this mortgage were fraudulent *per se*, then what the parties did under it in taking and delivering possession before the petition for the adjudication of the insolvency of the debtor was filed

would be of no avail to the defendant to enable him to hold the goods which are included within the terms of the mortgage. But being valid, as we hold, no question can be made in regard to the right of the defendant to hold the goods which were in the store at the time of the execution of the mortgage. These goods the defendant would hold by force of the mortgage, if no possession had been taken under the mortgage before the filing of the petition in insolvency.

2. The plaintiff contends that the defendant cannot hold the after-acquired goods, as they were not in existence as the property of Houghton, either expressly or potentially when the mortgage was given. At law it is elementary that one cannot convey by mortgage, or absolutely, personal property which has no express or potential existence as his property at the time of the conveyance. If the mortgage was fraudulent *per se*, and void, possession taken under it would be of no avail. Being void, all acts done under it would partake of the same invalidity. The maxim, *Ex nihilo nihil fit*, would apply. But the mortgage being valid, and of force, not only as between the parties, but as against attaching creditors and *bona fide* purchasers for value paid, the agreement to include the after-acquired goods fitted and necessary to keep the stock up to the required amount or more was also valid. This was a valid agreement to place such after-acquired goods of the class and description named within the operation of the mortgage as soon as they were acquired. In equity, what the parties had thus agreed to do would be treated as done as soon as the property was acquired. But at law it is otherwise until the parties have done some act to identify the property intended, and place it within the operation of the mortgage. Taking possession by the mortgagee under a valid mortgage has frequently been held a sufficient act for this purpose, although the mortgagor did not participate in it. But where, as here, the possession is taken by the mortgagee or his agent, with the consent and approval of the mortgagor, it has always, so far as we have observed, been held sufficient to place the after-acquired goods within the operation of the mortgage. The mortgagee is then a mortgagee in possession of property which the mortgagor agreed should be covered by the mortgage, and which his consent and approval has placed under its cover. There is force in holding that, under a mortgage in terms covering after-acquired property, the act of the mortgagor, in purchasing, and bringing after-acquired property into the common stock of

such property, is consent on his part, or his placing such goods, so far as he can, within the operation of the mortgage, and that nothing more is needed but for the mortgagee to accept the goods so placed, which he does by taking possession. When so taken possession of, before seizure by other creditors, the goods come under the cover and operation of the mortgage as of its date. The mortgage, being of more than four months' standing, is valid against the proceedings in insolvency. The after-acquired goods thus brought under the operation of the mortgage before any right of other creditors attached belong to the mortgagee, and not the assignee in insolvency. No fact is found or stated tending to show that the defendant knew of the insolvency of Houghton before he took possession of the goods. It is stated that Houghton was in fact insolvent on the day the defendant caused possession to be taken under the mortgage. The question is not raised or considered in regard to the rights of the parties, if it had been stated that the defendant knew that Houghton was insolvent when he took possession, and took possession to obtain the preference agreed to be given him in the mortgage. Under the late United States bankrupt law it was frequently held that a mortgage, executed so recently as to be inoperative as against the adjudication of bankruptcy, was nevertheless valid and operative if made in accordance with an agreement between the mortgagee and bankrupt of long enough standing to be valid against the adjudication,—that such mortgage was to be given effect as of the date of the agreement.

While this is the first time the questions involved in this case have been before the court for consideration, it is not the first time they have arisen, and been decided. The same questions arose on two occasions in insolvency proceedings in Caledonia County. In one instance they were submitted to the late Judge Poland, and in the other to Judge Powers and the judge of insolvency. The questions were carefully presented and considered, and the same conclusions reached which have been herein announced.

The judgment of the county court is affirmed.

CHATTEL MORTGAGE ALLOWING THE MORTGAGOR TO RETAIN POSSESSION, AND TO SELL THE PROPERTY. — Perhaps no topic of the law has been more thoroughly discussed or more frequently decided than the one under consideration. Certain it is that none can be found in which judicial opinion so widely differs, and, as has been said of it, "the cases cannot be reconciled by any process of reasoning or on any principle of law." As is shown by the

principal case, it has been the subject of heated discussion between eminent jurists and writers, who, after a careful examination and analysis of the cases, arrived at opposite conclusions, each maintaining that the weight of reason and authority supported his view. No matter on which side the numerical excess of cases may fall, it seems to us that the weight of reason is on that side which maintains that, except as between the parties, a chattel mortgage conveying goods or merchandise containing a provision, or about which there is a contemporaneous or subsequent verbal agreement, that the mortgagor may remain in possession, and sell the property in the usual course of business, applying the proceeds to the purchase of other goods to keep up the security of the mortgagee, is fraudulent and void as to subsequent purchasers or the creditors of the mortgagor. Or if it is agreed in any manner between the parties that the mortgagor is to sell any part of the goods as his own, for his own benefit, or that of his family, and there is no express provision that the proceeds of all sales must be applied absolutely to the extinguishment of the mortgage debt, then the mortgage is void *per se* and *ab initio*, and invalid in law, as to the mortgagor's creditors, purchasers, or encumbrancers.

In all this judicial dissension, it but remains for each state to adopt that line of decision which best accords with its own views of public policy, and seems to its judges to be best sustained by reason and authority.

The views expressed by Chief Justice Horton in his dissenting opinion to *Frankhouser* v. *Ellett*, 22 Kan. 127–151, 31 Am. Rep. 171, are so nearly in harmony with those which seem to us to be reasonable and just that we cannot refrain from giving them *in extenso:* "I am clearly of opinion that a chattel mortgage upon a stock of goods in trade which permits by its conditions the mortgagor to remain in possession of the property, and to dispose of it by sale, in the due course of trade, until the maturity of the debt proposed to be secured by it, is fraudulent in law as to the creditors of the person making the same and as to subsequent purchasers, and is absolutely null and void as to them, without reference to the *bona fides* of the mortgage debt or the intention of the mortgagor as to fraud. I further hold that if the power of disposition does not appear upon the face of the mortgage, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and in continuation of the same views, it seems to me that the license allowed to the mortgagor in this case, to continue in his business of merchandising, and to dispose of the mortgaged goods and chattels to purchasers in his usual way, to receive and largely control the proceeds of the sales, to use portions of the goods, together with sufficient of the money derived in the business, to support himself and family, make the chattel mortgage in issue absolutely null and void as to creditors and subsequent purchasers, at least until the license is revoked by the mortgagor. After all, with such a license in force, the so-called mortgage resolves itself merely into personal security. The power granted to the mortgagor by the mortgagee enables the latter to defeat the provisions of the instrument. For the time being, the exercise of this power destroys it. It is completely *felo de se*. Again, this mortgage, accompanied with the license to the mortgagor, is of no great advantage to the mortgagee, but benefits the debtor, and is exceedingly injurious to other creditors. Indeed, its main purpose is as a ward to keep off other creditors. When agreements are made to hinder and delay creditors, the law imputes to them a fraudulent purpose, and therefore they are held null and void. I think a like imputation lies against the arrangement of the parties to this chattel mortgage, and that, upon the agreed statement of

facts, judgment should have been rendered in favor of the plaintiff in error. In support of these views, I refer to the following: *Robinson* v. *Elliott*, 22 Wall. 513; *Collins* v. *Myers*, 16 Ohio, 547; *Freeman* v. *Rawson*, 5 Ohio St. 1; *Harmon* v. *Abbey*, 7 Id. 218; *Griswold* v. *Sheldon*, 4 N. Y. 581; *Twine's Case*, 3 Coke, 80; *Ryall* v. *Rowles*, 1 Ves. Sr. 348; *Worsley* v. *De Mattos*, 1 Burr. 467; *Paget* v. *Perchard*, 1 Esp. 205; *Wordall* v. *Smith*, 1 Camp. 332; *Lang* v. *Lee*, 3 Rand. 410; *Addington* v. *Etheridge*, 12 Gratt. 436; *McLachlan* v. *Wright*, 3 Wend. 348; *Dirver* v. *McLaughlin*, 2 Id. 596; 12 Am. Dec. 92; *Wood* v. *Lowry*, 17 Wend. 492; *Stoddard* v. *Butler*, 20 Id. 507; *Edgell* v. *Hart*, 9 N. Y. 213; 59 Am. Dec. 532; *Gardner* v. *McEwen*, 19 N. Y. 123; *Mittnacht* v. *Kelly*, 3 Keyes, 407; *Russell* v. *Winne*, 37 N. Y. 591; 97 Am. Dec. 755; *Colburn* v. *Pickering*, 3 N. H. 415; 14 Am. Dec. 375; *Ranlett* v. *Blodgett*, 17 N. H. 298; 43 Am. Dec. 603; *Putnam* v. *Osgood*, 51 N. H. 192; 52 Id. 148; *Horton* v. *Williams*, 21 Minn. 187; *Place* v. *Longworthy*, 13 Wis. 629; 80 Am. Dec. 758; *Strenart* v. *Deuster*, 23 Wis. 136; *Bishop* v. *Warner*, 19 Conn. 460; *Davis* v. *Ransom*, 18 Ill. 396; *Barnet* v. *Fergus*, 51 Id. 352; 99 Am. Dec. 547; *Walter* v. *Wimer*, 24 Mo. 63; *Stanley* v. *Bruce*, 27 Id. 269; *Armstrong* v. *Tuttle*, 34 Id. 432; *Lodge* v. *Samuels*, 50 Id. 204; *Welsh* v. *Bikey*, 1 Pa. St. 57; *Houer* v. *Geesaman*, 17 Serg. & R. 251; *National Bank* v. *Ebbert*, 2 South. L. Rev., 1st Ser., 175." To this aggregation of authority may be added the following cases, which fully sustain the views above set forth: *Hangen* v. *Hachemeister*, 114 N. Y. 566; *Potts* v. *Hart*, 99 Id. 168; *Southard* v. *Benner*, 72 Id. 424; *Lund* v. *Fletcher*, 39 Ark. 325; 43 Am. Rep. 270; *Martin* v. *Ogden*, 41 Ark. 186; *Gaus's Sons* v. *Doyle*, 46 Id. 122; *Wilcox* v. *Jackson*, 7 Col. 521; *Wilson* v. *Voight*, 9 Id. 614; *Brasher* v. *Christophe*, 10 Id. 284; *Blakeslee* v. *Rossman*, 43 Wis. 116; *Anderson* v. *Patterson*, 64 Id. 557; *Baum* v. *Bosworth*, 68 Id. 196; *Orton* v. *Orton*, 7 Or. 478; 33 Am. Rep. 717; *Jacobs* v. *Ervin*, 9 Or. 52; *Bremer Co.* v. *Flekenstein*, 9 Id. 266; *Bannon* v. *Bowler*, 34 Minn. 416; *Brown* v. *Webb*, 20 Ohio, 389; *Peiser* v. *Petirolas*, 50 Tex. 638; 32 Am. Rep. 621; *National Bank* v. *Lovenberg*, 63 Tex. 506; *Duncan* v. *Taylor*, 63 Id. 645; *Gregory* v. *Whedon*, 8 Neb. 373; *Mobley* v. *Letts*, 41 Ind. 11; *Seavey* v. *Walker*, 108 Id. 78; *Bullene* v. *Barrett*, 87 Mo. 185; *Owens* v. *Hobbie*, 82 Ala. 466; *Rome Bank* v. *Haselton*, 15 Lea, 216; *Wells* v. *Longbein*, 20 Fed. Rep. 183; *In re Kahley*, 2 Biss. 383; *Catlin* v. *Currier*, 1 Saw. 7; *Matter of Manley*, 2 Bond, 261; *Dunning* v. *Mead*, 90 Ill. 376; *Simmons* v. *Jenkins*, 76 Id. 479; *Joseph* v. *Levi*, 58 Miss. 843.

Perhaps the leading case in support of this doctrine, because of the source from which it emanated, is that of *Robinson* v. *Elliott*, 22 Wall. 513, where the supreme court of the United States gave unqualified approval to the principle that a mortgage of a stock of goods containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of business, and to use the money thus obtained to replenish his stock, is invalid, as matter of law, and the court may pronounce it void.

In a later case, however, the same court holds, in construing a Michigan statute, that such a mortgage is not fraudulent and void *per se*, but only *prima facie* fraudulent as to creditors of the mortgagor, and that it is for the jury to say, from the evidence, whether such fraud is proved, though if the proof is convincing, and leaves no room for doubt, it may be instructed that the mortgage is void: *People's Savings Bank* v. *Bates*, 120 U. S. 556. Other rulings to the same effect under and construing statutes have lately been made by the federal courts, among which are: *Morse* v. *Riblet*, 22 Fed. Rep. 501; *Marsh* v. *Bird*, 22 Id. 576; *Hills* v. *Stockwell*, 23 Id. 432; *Overman* v. *Quick*, 8 Biss. 134.

In the case of *People's Savings Bank* v. *Bates*, *supra*, no mention is made of the previous case of *Robinson* v. *Elliott*, *supra*, so that we think it safe to say that were a case presented to that court in which no statutory provision was involved, and in which the court was free to act upon principle, it would adhere to its former ruling, and pronounce such a mortgage void in law. In fact, *Robinson* v. *Elliott*, *supra*, is cited, and the doctrine therein announced is approved in the late case of *Means* v. *Dowd*, 128 U. S. 273.

As was stated in the beginning, the rule is the same whether the agreement to allow the mortgagor to sell is recited in the instrument, or is verbal and extrinsic. As Allen, J., said in *Southard* v. *Benner*, 72 N. Y. 432: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact, and render it harmless. If it is satisfactorily established, the result upon the security must be the same": *Edgell* v. *Hart*, 9 Id. 213; 59 Am. Dec. 532; *McLean* v. *Lafayette Bank*, 3 McLean, 623; *Bowen* v. *Clark*, 1 Biss. 128; *In re Kahley*, 2 Id. 383: *In re Cantrell*, 6 Ben. 482; *In re Kirkbridge*, 5 Dill. 116.

We come now to that line of authorities, respectable in number at least, which hold that a chattel mortgage which, by its terms, or otherwise, permits the mortgagor to retain possession, and sell the goods in the ordinary course of trade, is not void *per se;* that the power of sale is only evidence of a fraudulent intention, to go to the jury; the latter to determine, upon all the facts and circumstances, the question of fraud. It will be noticed that none of these cases holds that the court may rule, as matter of law, that such a mortgage is valid. They do maintain, however, that it is only *prima facie* fraudulent; that in such cases fraud is a question of fact, and not of law, and that this question is for the jury to determine. The leading case on this side of the question is that of *Brett* v. *Carter*, 2 Low. 458; and it finds a following in the cases cited below: *Muncie Nat. Bank* v. *Brown*, 112 Ind. 474; *Fisher* v. *Syfers*, 109 Id. 514; *Stix* v. *Sadler*, 109 Id. 254; *McLaughlin* v. *Ward*, 77 Id. 383; *Morris* v. *Stern*, 80 Id. 227; *Turner* v. *Killain*, 12 Neb. 580; *Davis* v. *Scott*, 22 Id. 154; *Hisey* v. *Goodwin*, 90 Mo. 366; *Oliver* v. *Eaton*, 7 Mich. 108; *Gray* v. *Bidwell*, 7 Id. 519; *Leland* v. *Collver*, 34 Id. 418; *People* v. *Bristol*, 35 Id. 28; *Wingler* v. *Sibley*, 35 Id. 231; *Deering* v. *Cobb*, 74 Me. 332; 43 Am. Rep. 596; *Cheatham* v. *Hawkins*, 76 N. C. 335; 80 Id. 161; *Bynum* v. *Miller*, 89 Id. 393; *Hughes* v. *Cory*, 20 Iowa, 399; *Clark* v. *Hyman*, 55 Id. 14; *Williams* v. *Winsor*, 12 R. I. 9; *Hirshkind* v. *Israel*, 18 S. C. 157; *Fletcher* v. *Powers*, 131 Mass. 333; *Frankhouser* v. *Ellett*, 22 Kan. 127; 31 Am. Rep. 171; *Van Meter* v. *Estell*, 78 Ky. 456; *Rose* v. *Bevan*, 10 Md. 466; *Whitson* v. *Griffis*, 39 Kan. 211; 7 Am. St. Rep. 546; *Dobyns* v. *Meyer*, 95 Mo. 132; 6 Am. St. Rep. 32; but see note thereto 34; *Miller* v. *Shreve*, 29 N. J. L. 250; *Lister* v. *Simpson*, 38 N. J. Eq. 438; *Britton* v. *Criswell*, 63 Miss. 394; *Webb* v. *Armstrong*, 70 Mo. 217.

In *Brett* v. *Carter*, *supra*, Lowell, J., doubts "both the generality and justice" of the rule stated by Davis, J., in *Robinson* v. *Elliott*, *supra*, and regards the doctrine as substantially settled that when the mortgagor is permitted to retain the possession and control of the goods, and to act as the apparent owner, the question whether this is fraud or not is for the jury. He says: "A conveyance for a valuable consideration is never fraud in law on the face of the deed; and if fraud is alleged to exist, it must be proved as a fact"; and he considers it plain that the rule in *Robinson* v. *Elliott*, *supra*, "virtually prevents a trader from mortgaging his stock of goods at any time for any use-

ful purpose; for if he cannot sell in the ordinary course of trade, or only as a trustee or agent of the mortgagee, he might as well give possession to the mortgagee at once, and go out of the business." Some of the cases on this side of the question embody the principle that the mortgage is only *prima facie* fraudulent when it provides that the mortgagor may retain possession and sell the goods, replacing them with others of like kind and value, and that the lien of the mortgage shall extend to the goods purchased: *Roundy* v. *Converse*, 71 Wis. 524; 5 Am. St. Rep. 240; *Fisher* v. *Syfers*, 109 Ind. 514; *Leland* v. *Collver*, 34 Mich. 418; *Lister* v. *Simpson*, 38 N. J. Eq. 438. In the last case, Van Fleet, V. C., devotes several pages to a well-digested discussion of the question, and among other things says: "This case presents a question on which judicial opinion is divided. An eminent judge has said the decisions respecting it cannot be reconciled by any process of reasoning or any principle of law. The question is this: Is the mortgage of a stock of merchandise, which by its terms permits the mortgagor to sell the property mortgaged in the usual course of business, and also provides that its lien shall extend to such goods as may be subsequently purchased to replace those sold, fraudulent *ipso facto* as to creditors? The test question is, Does the simple presence of an authority to the mortgagor to sell the mortgaged chattels, in the ordinary course of business, in a mortgage of a stock of merchandise, furnish such conclusive evidence that the mortgage was executed to defraud creditors that the court should, simply upon finding such authority, and without any other evidence of fraud, declare the mortgage to be fraudulent? There are several cases, decided by courts highly distinguished for learning and wisdom, which declare that this question should be answered in the affirmative." After a discussion and citation of some of the cases which maintain that such a mortgage is fraudulent *per se*, the court remarks: "Although this question in its present form has never been presented to this court, still, I think the doctrine of the cases just referred to stands in such sharp conflict with the course of judicial opinion in this state upon this subject, and is so strongly opposed to what I regard as the manifest policy of our statute concerning chattel mortgages, that, I think, even if I was convinced that it was sound and wholesome, I would not be at liberty to adopt it. The mere fact that a mortgagor retains possession and uses the mortgaged chattels was never accepted in this state as conclusive and unanswerable evidence of fraud."

There is another line of authority which holds that when the mortgage contains a provision that the proceeds of all sales made under it are to be applied to the satisfaction of the mortgage debt, the mortgage is not fraudulent *per se*, but only *prima facie* fraudulent. It seems that in such case the mortgagor is regarded merely as the agent of the mortgagee, and every sale satisfies the mortgage *pro tanto*, whether the money reaches the mortgagee or not: *Conkling* v. *Shelley*, 23 N. Y. 360; 84 Am. Dec. 348; *Ford* v. *Williams*, 13 N. Y. 577; 67 Am. Dec. 83; *Kleine* v. *Katzenberger*, 20 Ohio St. 110; 5 Am. Rep. 630; *Wilson* v. *Sullivan*, 58 N. H. 260; *Turner* v. *Kellain*, 12 Neb. 580; *Davis* v. *Scott*, 22 Id. 154; *Hubbell* v. *Allen*, 90 Mo. 574; *Murray* v. *McNealy*, 86 Ala. 234; *Crow* v. *Red River etc. Bank*, 52 Tex. 362; *Brackett* v. *Harvey*, 91 N. Y. 214; *Wilcox* v. *Jackson*, 7 Col. 521; *Bannon* v. *Bowler*, 34 Minn. 416.

An examination of all the cases on this much vexed and disputed question has only strengthened our belief that such mortgages as we have been considering should be held fraudulent and void *per se*, and so declared by the court. It also appears to us that the weight as well as the reason of modern authority tends to this conclusion. As was said in the recent case of *Harman* v. *Hoskins*, 56 Miss. 142: "The general rule supported by authorities of

greatest weight, and sustained by the best of reason, is, that where a mortgage is made of the entire stock of goods, which includes all other articles of like nature that may be put in the store, and be on hand when default is made, the mortgagor remaining in possession, and selling in the usual course of business, and making purchases to replenish the stock, it is fraudulent as to creditors"; and the reason is, that a mortgage which, by its terms, or by verbal agreement between the parties, allows the mortgagor to sell the property mortgaged, serves to give the mortgagor a false credit, and affords the mortgagee no security whatever, for it makes it possible for the mortgagor, at any time, to sell the property as his own, and appropriate the proceeds to his own benefit and purposes, and consequently it is possible for the debtor, in every instance, so to use such an instrument as to deprive the mortgagee of all security, and yet to make the mortgage serve as an effectual shield to protect his property from his creditors. For these reasons, we think, though it may work a hardship in individual cases where no fraud is in fact intended, public policy demands that such mortgages should be conclusively presumed fraudulent and void, as such stipulations are not only inconsistent with the idea of a mortgage, but tend invariably and inevitably to give a fraudulent advantage to the debtor over his *bona fide* creditors.

GILLIS *v.* WESTERN UNION TELEGRAPH COMPANY.

[61 VERMONT, 461.]

TELEGRAPH COMPANIES — CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE VOID. — A stipulation in the printed blanks used by a telegraph company exempting it from liability for its negligence in the transmission of unrepeated messages beyond the price received for sending the same, is unreasonable and void as against public policy.

TELEGRAPH COMPANIES — DEGREE OF CARE DUE FROM — STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE VOID. — Telegraph companies are bound, in the discharge of their duties to the public, to exercise that degree of care and skill that careful and prudent men exercise in like circumstances, and they cannot restrict this liability by contract or notice, nor can they stipulate against liability for negligence of any kind.

CASE for negligence in the transmission of a telegram. Judgment for plaintiff. Defendant excepts.

Waterman, Martin, and Hitt, for the plaintiff.

Haskins and Stoddard, for the defendant.

ROWELL, J. The plaintiff, a peddler, telegraphed from Rochester, New Hampshire, to the American Express Company's agent at Brattleboro, Vermont, to "send my bale here." Through the want of due care in transmission, the letter "H" got changed to "Y," so that when received at Brattleboro, the message purported to come from Rochester, New York, and the bale was sent there, to the damage of the plaintiff. The

message was unrepeated, and written on one of the company's blanks containing the usual condition as to unrepeated messages, namely, that the company should not be liable for mistakes in the transmission thereof, "whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same." The plaintiff did not read this condition, nor know what it was, although he had sent and received a good many communications by telegraph.

Treating the condition as binding on the plaintiff, if valid, although not brought home to his knowledge, as it was treated in argument, the question is, whether it is valid or not.

It is very generally conceded that telegraph companies may limit their common-law liability by express contract, and also by rules and regulations, when brought to the knowledge of their patrons, and assented to by them. But as to the extent to which they may do this, and as to the reasonableness of the rules and stipulations by which they seek to do it, courts do not agree.

It seems to be a fundamental principle, running through all the cases, that rules and stipulations for immunity, in order to be valid, must be just and reasonable in the eye of the law, and not inconsistent with sound public policy. But the cases differ widely in the application of this principle, and largely, no doubt, because of the conflicting views as to the legal *status* of such companies.

A few of the earlier cases hold that they are common carriers; or if not strictly such, yet sufficiently so to make them amenable to the same law as common carriers. *Parks* v. *Alta Cal. Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, is a leading case of this character. But this view has not obtained; and it is now generally held in this country that telegraph companies are not common carriers, nor liable as such, but are liable only for failure to exercise due care, and the ground of this proposition is, that although telegraph companies, like common carriers, are in the exercise of a public calling, and consequently under obligation to serve all who choose to employ them within the scope of their business, yet, that the difference between the transmission of intelligence by means of electricity and the transportation of goods by any means is so great that telegraph companies are not common carriers, and that the principle of public policy that imposes upon common carriers the exceptional liability of insurers is not applicable to them: *Kiley* v. *Western U. Tel. Co.*, 109 N. Y. 231; *Grinnell*

v. *Western U. Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Tyler* v. *Western U. Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Birney* v. *New York etc. Printing Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607, and cases *passim*.

A few cases assign telegraph companies to the category of bailees for hire, as *Birney* v. *New York etc. Printing Tel. Co.*, *supra*; *Pinckney* v. *Western U. Tel. Co.*, 19 S. C. 71; 45 Am. Rep. 765, and some others. And the argument is, that as the ground of their liability is the same as that of bailees, the legal *status* of the two must be the same. But this doctrine is justly criticised, because telegraph companies are engaged in a business of a public nature, and are precluded by rights and duties incident thereto from occupying the legal *status* of an ordinary bailee for hire, whose rights and duties arise wholly from the contract of employment: Gray on Communication by Telegraph, sec. 10.

Although there may be no analogy between the business of telegraph companies and that of public carriers of passengers for hire, yet we regard their legal *status* as practically the same. Both are engaged in a business of a public nature; both must serve all who come; neither are insurers, nor liable as such, but both are liable for negligence.

The question, then, is, whether it is just and reasonable in the eye of the law, and consistent with public policy, that telegraph companies should be allowed to stipulate for immunity from liability for their own and their servants' negligence.

The supreme court of the United States holds that common carriers cannot lawfully stipulate for exemption from liability when such exemption is not just and reasonable in the eye of the law; that it is not just and reasonable in the eye of the law for them to stipulate for exemption from liability for the negligence of themselves or their servants; and that these rules apply to carriers of goods and to carriers of passengers for hire, and with special force to the latter: *New York etc. R. R. Co.* v. *Lockwood*, 17 Wall. 357. If then, as we have said, the legal *status* of telegraph companies and of carriers of passengers for hire is practically the same, that case is strong authority against the validity of the stipulation under consideration. "Conceding," the court says, "that special contracts made by common carriers with their customers limiting their liability are good and valid as far as they are just and reasonable, to the extent, for example, of excusing them for all losses happening by accident, without negligence or fraud on their

part, when they ask to go still further, and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation; but the contrary." This case agrees with the general rule on the subject.

While courts differ widely as to whether telegraph companies can lawfully stipulate to any extent against liability for negligence, none appear to have gone the length of holding that they can properly stipulate against liability for gross negligence, as they call it. But many of the cases hold that regulations like the one in question, as to non-liability in respect of unrepeated messages, and similar regulations, are reasonable precautions for telegraph companies to take, and are binding upon all who assent to them, so as to exempt the company from liability beyond the amount stipulated for any cause except gross negligence or willful misconduct on its part. Such a regulation, it is said, does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmission and delivery of the message of such importance to him that he intends to hold the company responsible in damages beyond the amount paid for the message for non-fulfillment of the contract on its part, to increase the payment by one half, and that even common carriers have a right to inquire as to the quality and value of the goods and packages intrusted to them for carriage, and are not liable for goods of unusual value if false answers are made to their inquiries.

The cases of this class have been so often and so fully reviewed, and the ground of them stated, that it is not necessary to review them here, nor to do more than refer to some of them. *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485, is a leading case of this class, in which Mr. Chief Justice Gray reviews the cases to a considerable extent, and points out what is regarded as the fallacy of some of them. The following cases are also of this class: *Kiley* v. *Western Union Tel. Co.*, 109 N. Y. 231; *Wann* v. *Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525; *Passmore* v. *Western Union Tel. Co.*, 78 Pa. St. 238; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Lassiter* v. *Western Union Tel. Co.*, 89 N. C. 334.

In these cases, gross negligence seems to be used to define a degree of carelessness greater than that involved in ordinary negligence, and one of which the law takes distinct cognizance

as an independent ground of liability. It may well be doubted whether there is any difference in law between negligence and gross negligence. The tendency of judicial opinion is to deny it. But however that may be, we are not prepared to follow this line of cases. As this is the first time this question has ever been before this court for decision, we are at liberty to adopt the view we regard as most just and reasonable, and the most consistent with sound public policy; and when we consider the relation of telegraph companies to the public, the character and extent of their business, and the duties and obligations incident thereto, we see no sufficient reason for distinguishing between ordinary and gross negligence in this behalf, and think it most just and reasonable, and most consistent with sound public policy, that they be not allowed to stipulate against liability for negligence of any kind, if there be more than one kind.

Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. They are created to promote public convenience; and until the introduction of the telephone, they were, and practically still are, especially for considerable distances, without competition, save among themselves, in the transmission of intelligence by electricity. Their business has increased to vast proportions, and neither the commercial world nor the general public can dispense with their services. It is therefore just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public policy demands.

A former eminent chief judge of this court, in his collection of American railway cases, says that "every attempt of carriers, by general notice or special contract, to excuse themselves from responsibility for losses or damage resulting in any degree from their own want of care or faithfulness, is against the good faith that the law requires as the basis of all contracts and employments, and therefore based upon principles and a policy that the law will not uphold." This doctrine is equally applicable to telegraph companies.

In the recent case of *Smith* v. *Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, it is said that telegraph companies are public agents, engaged in a *quasi* public business; that care and fidelity are essential to their character as public servants, and that public policy forbids that they should ab-

dicate, as to the public, by a contract with an individual, who is but one of millions, whose business will not, perhaps, admit either of delay or contest in the courts, but who is compelled to submit to any terms that the company may impose, and that the law should not uphold a contract by which public agents seek to shelter themselves from the consequences of their own wrong and neglect; that the liability of telegraph companies is not founded wholly upon contract; that they are chartered for public purposes, extraordinary powers conferred upon them, the right of eminent domain given to them, and that if they did not serve the public they could not constitutionally string wires over a man's land without his consent; wherefore they are obliged to receive and transmit messages, and are liable for neglect without any express contract, and that if they rely upon a contract or a notice to restrict liability, it must be one not in violation of public policy; that in view of the vast interests committed to them, the extraordinary powers conferred upon them, and the virtual monopoly they enjoy, courts should compel them, *nolens volens*, to perform the corresponding duties of diligence and good faith to the public thereby created; that any other rule would defeat the very purpose for which the companies are chartered, namely, the accurate and speedy transmission of messages for the public; that while they may restrict their liability to a reasonable extent, they cannot to the extent of immunity from the consequences of their own negligence; that they must bring to the discharge of their duties that degree of care and skill that careful and prudent men exercise in like circumstances, and that any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-performance, is forbidden by the demands of sound public policy; and that to hold otherwise would arm them with very dangerous power, and leave the public comparatively remediless. This reasoning is entirely satisfactory to us, and we adopt it as our own.

There are many other cases that hold the same way and upon substantially the same grounds, among which are the following: *True* v. *International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Ayer* v. *Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353; *Fowler* v. *Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Telegraph Co.* v. *Griswold*, 37 Ohio St. 301; 41 Am. Rep. 500; *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; *Thompson* v. *Western Union Tel. Co.*, 64 Wis.

531; 54 Am. Rep. 644; *Sweetland* v. *Illinois and Mississippi Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Western Union Tel. Co.* v. *Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Marr* v. *Western Union Tel. Co.*, 85 Tenn. 529; *Womack* v. *Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614.

Judgment affirmed.

TELEGRAPH COMPANIES — LIMITING LIABILITY BY CONTRACT. — A stipulation requiring a message to be repeated is no defense to an action to recover damages for delay or failure in delivering such message: *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843. A telegraph company cannot, by any contract not fair, just, and reasonable, if at all, limit its liability for damages caused by its negligence in transmitting messages: *Pepper* v. *Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and particularly note. A telegraph company may, however, limit its liability to defaults occurring upon its own line, where it receives a message for transmission over its own line and that of another company: *Western Union Tel. Co.* v. *Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630; and compare cases collected in note.

GOLDSMITH *v.* JOY.

[61 VERMONT, 488.]

CRIMINAL LAW — ASSAULT — DAMAGES. — When a party, by an act which he could have avoided, and which he cannot justify, inflicts an immediate injury upon another by force, he is legally answerable in damages to the party injured.

CRIMINAL LAW — ASSAULT. — WORDS OF PROVOCATION are no legal excuse for the infliction of personal violence.

CRIMINAL LAW — ASSAULT — DAMAGES. — WORDS OF PROVOCATION cannot be given in defense to the claim of actual or compensatory damages for an assault, but only in mitigation of exemplary damages.

EXEMPLARY DAMAGES ARE NOT RECOVERABLE AS MATTER OF RIGHT, but are given to stamp the condemnation of the jury upon the acts of defendant because of their malicious or oppressive character.

CRIMINAL LAW — ASSAULT — EXEMPLARY DAMAGES — CHARACTER OF PARTIES. — In assessing exemplary damages for an unprovoked assault, the character and standing of the parties involved should be considered by the jury.

TRESPASS for assault and battery. The assault was not denied; but defendant claimed that it was committed under the influence of passion, induced by insulting and unjustifiable language used by the plaintiff toward him at and just before the time that the assault was committed, and that the fact that such language was used should be considered by the jury in assessing both actual and exemplary damages. Judgment for plaintiff. Defendant appealed.

Martin and Archibald, J. L. Martin, and J. C. Baker, for the plaintiff.

Batchelder and Bates, and W. B. Sheldon, for the defendant.

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that, no matter how great the provocation, the defendant was bound, in any event, to answer for these damages.

It is a general and wholesome rule of law that whenever, by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured.

The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery, has undergone wide discussion.

The English cases lay down the general rule that provocation may mitigate damages. The case of *Frazer* v. *Berkeley*, 7 Car. & P. 789, is often referred to, in which Lord Abinger held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; that it would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation. Tindal, C. J., in *Perkins* v. *Vaughan*, 5 Scott N. R. 881, said: "I think it will be found that the result of the cases is, that the matter cannot be given in evidence where it amounts to a defense, but that where it does not amount to a defense, it may be given in mitigation of damages": *Linford* v. *Lake*, 3 Hurl. & N. 275. Addison on Torts, section 1393, recognizes the same rule.

In this country, 2 Greenleaf on Evidence, section 93, states the rule that a provocation by the plaintiff may be thus shown, if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are: *Cushman* v. *Ryan*, 1 Story, 100; *Avery* v. *Ray*, 1 Mass. 12; *Lee* v. *Woolsey*, 19 Johns. 241; 10 Am. Dec. 230; and *Maynard* v. *Beardsley*, 7 Wend. 560; 22 Am. Dec. 595. The supreme court of

Massachusetts has generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind: *Mowry* v. *Smith*, 9 Allen, 67; *Tyson* v. *Booth*, 100 Mass. 258; *Bonino* v. *Caledonio*, 144 Id. 299. It is also said in 2 Sedgwick on Damages, seventh edition, 521: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this, that when there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure."

In *Burke* v. *Melvin*, 45 Conn. 243, Park, C. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damages the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damages, while the damages in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In *Bartram* v. *Stone*, 31 Id. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat" produced by the plaintiff's false accusation. See also *Richardson* v. *Hine*, 42 Id. 206.

In *Kiff* v. *Youmans*, 86 N. Y. 324, 40 Am. Rep. 543, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was, whether he used unnecessary force. Danforth, J., said: "It still remains that the plaintiff provoked the trespass, was himself guilty of the

act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them."

In *Robison* v. *Rupert*, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages."

In *Ireland* v. *Elliott*, 5 Iowa, 478, 68 Am. Dec. 715, the court said: "The furthest that the law has gone, and the furthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages."

In *Thrall* v. *Knapp*, 17 Iowa, 468, the court said: "The clear distinction is this: contemporaneous provocation of words or acts are admissible, but previous provocations are not; and the test is, whether 'the blood has had time to cool.' . . . . The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with his natural feelings to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand, the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace, that if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action": 2 Ld. Raym. 955, per Lord Holt. The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In *Morely and Wife* v. *Dunbar*, 24 Wis. 183, Dixon, C. J., held that, notwithstanding what was said in *Birchard* v. *Booth*, 4 Id. 85, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and where

the provocation is great, and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. But in *Wilson* v. *Young*, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings, Dixon, C. J., however, adhering to the rule in *Morely* v. *Dunbar*, *supra*, that it might go to reduce all compensatory damages; but in *Fenelon* v. *Butts*, 53 Id. 344, and in *Corcoran* v. *Harran*, 55 Id. 120, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of punitory but not of actual damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault.

In *Donnelly* v. *Harris*, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. Walker, C. J., in delivering the opinion of the supreme court, remarked: "Had this modification been limited to exemplary damages, it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect, would be to abrogate, in effect, one of the most firmly established rules of the law." See also *Ogden* v. *Claycomb*, 52 Id. 366. In *Gizler* v. *Witzel*, 82 Id. 322, the court said, in reference to the charge of the court below: "The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words, and committed a technical assault, the acts of the defendant must be still limited to a reasonable self-defense."

In *Norris* v. *Casel*, 90 Ind. 143, this precise question was not raised; but the court said, in reference to the instructions of the court below, that the first part of the charge, that a provocation by mere words, however gross and abusive, cannot justify an assault, was correct, and that a person who makes

such words a pretext for committing an assault commits thereby, not only a mere wrong, but a crime, and the person so assaulted is not deprived of the right of reasonable self-defense, even though he used the insulting language to provoke the assault against which he defends himself; but whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault.

Johnson v. *McKee*, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The supreme court said: "In regard to provocation, the court charged, in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words, he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called exemplary damages. As there is no case in which a party who is damaged, and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain, it was not the defendant."

The court said in *Prentiss* v. *Shaw*, 56 Me. 427, 96 Am. Dec. 475: "We understand the rule to be this: a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. . . . . If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property must pay all the damages to such person or property directly and actually resulting from the illegal act? . . . . Where the trespass or injury is upon personal or real property, it would be a novelty to hear a claim for a reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, ... must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other, mitigation of the damages claimed; but he holds the law to be, that

mitigant circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act.

In a learned article on damages in actions *ex delicto*, 3 Am. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd, even without resorting to the definition of damages, to say that they shall be for a part only of the injury."

"It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for legal indemnification in the shape of damages": 4 Dall. 207, per Shippen, C. J.

Jacobs v. *Hoover*, 9 Minn. 204, *Cushman* v. *Waddell*, 1 Bald. 57, and *McBride* v. *McLaughlin*, 5 Watts, 375, are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that unless the plaintiff has given the defendant a provocation amounting, in law, to a justification, he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum, and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If in one case the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant, and thus overturn the well-settled rule of law that words cannot justify an assault? On the other hand, if words cannot justify, they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words, and therefore, though he struck and injured the plaintiff, he was only partly in the wrong, and should pay only part of the actual damages.

If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question; but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his

faculties should be held liable for his actual injuries to another, unless done in self-defense, or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is, that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in *Howland* v. *Day*, 56 Vt. 318, that "the law abhors the use of force, either for attack or defense, and never permits its use unnecessarily."

Exemplary damages are not recoverable as matter of right, but, as was stated by Wheeler, J., in *Earl* v. *Tupper*, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character: *Boardman* v. *Goldsmith*, 48 Id. 403, and cases cited; Mayne on Damages, 5865; *Voltz* v. *Blackmar*, 64 N. Y. 440.

The instructions to the jury upon this branch of the case were in substantial accordance with the law, as above stated. As exemplary damages were awardable in the discretion of the jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved.

We find no error in the charge, and the judgment is affirmed.

ASSAULT AND BATTERY — DAMAGES. — As to the allowance of exemplary damages for acts punishable criminally, such as assault and battery, malicious trespass, etc., note to *Austin* v. *Wilson*, 50 Am. Dec. 771–775.

EXEMPLARY DAMAGES, WHEN ALLOWABLE, AND WHEN NOT: See *Columbus etc. R'y Co.* v. *Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note; *Pittsburgh etc. R'y Co.* v. *Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note.

ASSAULT AND BATTERY. — In an action for an assault and battery, which is also punishable criminally, exemplary damages are not recoverable: *Fay* v. *Parker*, 53 N. H. 342; 16 Am. Rep. 270; but see *Hoadley* v. *Watson*, 45 Vt. 289; 12 Am. Rep. 197; *Rowe* v. *Moses*, 9 Rich. 423; 67 Am. Dec. 560; *Taber* v. *Hutson*, 5 Ind. 322; 61 Am. Dec. 96. In an action to recover exemplary damages for an assault and battery, it is not necessary that the jury should be satisfied, beyond a reasonable doubt, that the assault and battery was maliciously committed by defendant: *St. Ores* v. *McGlashen*, 74 Cal. 148.

NASH *v.* JEWETT.

[61 VERMONT, 501.]

INFANCY — CONTRACT OF INFANT — REPRESENTATION AS TO AGE. — An action in tort will not lie against an infant for fraudulently representing himself to be of full age, thereby obtaining credit, and inducing plaintiff to contract with him.

INFANCY. — FORM OF ACTION does not determine the liability of an infant, and he cannot be made liable when the cause of action arises from contract in an action in form *ex delicto*.

TRESPASS on the case against an infant.

John B. Meacham and G. H. Mason, for the plaintiff.

Batchelder and Bates, for the defendant.

TYLER, J. The plaintiff brings this action against the defendant to recover the damages which he claims to have sustained in consequence of the defendant having falsely and fraudulently represented to him that he was of the full age of twenty-one years, whereby the plaintiff was induced to sell the defendant certain goods and merchandise, and to take his promissory note therefor. The defendant pleads infancy, and the case comes to this court on demurrer to the plea.

Cases involving substantially the same question that is here presented have been decided by this court, and a full review of the authorities is unnecessary. It was held in *West* v. *Moore*, 14 Vt. 447, 39 Am. Dec. 235, and *Morrill* v. *Aden*, 19 Vt. 505, that to an action on the case for a false and deceitful warranty of a horse, infancy was a good defense; and in *Gilson* v. *Spear*, 38 Id. 315, 88 Am. Dec. 659, that an infant was liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action did not suppose that a contract existed; but where the *gravamen* of the fraud consisted in a transaction that really originated in contract, the plea of infancy was a good defense. In *Doran* v. *Smith*, 49 Vt. 353, the defendant falsely and fraudulently represented that he was the owner of certain property, and had good right to sell the same; and the plaintiff, confiding in such representations, bought the property, and paid the defendant therefor. The property was not in fact the defendant's, and the plaintiff was compelled to surrender it to the true owner; yet a plea of infancy to a declaration in case was held good on demurrer.

The plaintiff's counsel insist that a legal distinction can be drawn between the above cases and the one at bar, in that, in the present case, the false and fraudulent representation was

antecedent to and disconnected with the contract, although it was the inducement to it.

While it is true, as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in this case shows that the representations made by the defendant as to his age, using the concise language of Chief Justice Pierpoint in *Doran* v. *Smith*, *supra*, "enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved, or there can be no recovery. The contract is the basis of the action; the fraud is predicated upon the contract."

Benjamin in his work on sales, page 22, lays down the general rule that an action at law will not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him, and cites many authorities in support of the rule; but in his note, on page 442, he says that an infant may be held liable for a false statement as to his age, if he afterwards successfully refuses to pay on the ground of infancy.

The decision in *Fitts* v. *Hall*, 9 N. H. 441, which is referred to approvingly by Redfield, J., in *Towne* v. *Wiley*, 23 Vt. 355, 56 Am. Dec. 85, is relied upon by the plaintiff's counsel in this case; but that decision was not an authority in point in *Towne* v. *Wiley*, *supra*. In the latter case, an infant, who had hired a horse of a livery-stable keeper to drive to an agreed place twenty-three miles distant, returned by a circuitous route, nearly double that distance, left the horse standing out of doors during the night, and it died from overdriving and exposure. It was held that the infant was liable in trover for a conversion of the property by departing from the object of the bailment, the same as if he had taken it, in the first instance, without permission. In his opinion in that case Judge Redfield said: "In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive, substantial torts, but not for violations of contract merely, although, by construction, the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract, at his election."

In *Fitts* v. *Hall*, *supra*, the infant had rescinded the contract by which goods had been sold to him, and his note taken there-

for, on his false representation that he was of age, and had refused, on demand, to return the property. Parker, C. J., who delivered the opinion, said, in the subsequent case of *Burley* v. *Russell*, 10 N. H. 184, 34 Am. Dec. 146: "That decision is, that an infant is liable in case for a fraudulent affirmation that he is of age, whereby another is induced to enter into a contract with him, if he afterwards avoids the contract by reason of his infancy."

We think no distinction in principle can be drawn between this case and former cases referred to, decided by this court, and the judgment of the county court is affirmed.

INFANCY — CONTRACTS. — An action for deceit lies against an infant who has obtained property by the fraudulent representation that he was of age, and refuses to pay for it: *Rice* v. *Boyer*, 108 Ind. 472; 58 Am. Rep. 53. But an infant cannot be estopped from asserting his true age, nor from avoiding his contract by pleading his disability: *Alvey* v. *Reed*, 115 Ind. 148; 7 Am. St. Rep. 418, and note.

In the case of *McKamy* v. *Cooper*, 81 Ga. 679, where one Cooper sued the administrator of Miller upon notes executed by Miller during his lifetime, but during his minority, the charge of the court was held proper, which instructed that, although Miller perpetrated a fraud in falsely alleging himself to be twenty-one years of age at the time of executing said notes, plaintiff could not recover upon them if he was at the time an infant.

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ADVERSE POSSESSION.

1. TITLE OR RIGHTS IN LAND FOUNDED ON PRESCRIPTION originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner has granted the land or interest in the land so held adversely. *Turner* v. *Hart*, 243.
2. STATUTE OF LIMITATIONS. — No one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine; hence the statute of limitations requires that an action shall be brought within fifteen years after the right first accrues to the adverse party. *Id.*
3. NO PRESCRIPTIVE RIGHT IN LAND CAN BE CLAIMED until the claimant shows that the acts constituting the adverse user injured the complaining party, and gave him, or those claiming under him, a right of action. *Id.*

AFFIDAVIT.

1. FORMAL REQUISITES OF AN AFFIDAVIT are, the title, venue, signature, *jurat*, and authentication. *Beebe* v. *Morrell*, 288.
2. WHEN PROPERLY ENTITLED. — As a general rule, an affidavit must be entitled in a suit in which it is to be used. Still, if no suit is pending at the time, it need not be entitled; but if a suit is pending, and the affidavit is entitled in a suit not pending, it is a nullity. *Id.*
3. WHEN PROPERLY ENTITLED. — The test as to whether an affidavit is properly entitled is, whether or not perjury can be assigned upon it. *Id.*
4. SUFFICIENCY OF. — It seems that an affidavit filed in a pending suit, but not entitled, is not a nullity; the only inquiry is, Has the affidavit been fully identified as having been filed in that case? If it has, then want of formality of title is of no consequence. *Id.*
5. PRACTICE. — In civil suits, courts may refuse to hear affidavits read, not properly entitled in the case. *Id.*

See ATTACHMENT.

AGENCY.

1. ONE DEALING WITH AN AGENT IN A MATTER AFFECTING HIS PRINCIPAL, and knowing that the interest of the agent is adverse to that of his principal, should be held to the duty of ascertaining that the acts of the agent are authorized by his principal. *Farrington* v. *South Boston R. R. Co.*, 222.

2. NOTICE TO AN AGENT IS NOT IMPUTED TO HIS PRINCIPAL when the agent is engaged in the commission of an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. Hence a corporation remains answerable for the fraudulent issue of stock by one of its officers to whom it has given apparent authority to make such issue, though such officer is also the broker of the person to whom the stock is issued, when the latter acts in good faith, and has no personal knowledge of the fraudulent act of the officer. *Allen* v. *South Boston R. R. Co.*, 185.

3. AGENT'S LIABILITY FOR NON-FEASANCE. — An agent who has entire control of the premises and of the erection of a building for his principal is liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises and allowed them to remain in that condition. *Ellis* v. *McNaughton*, 308.

4. MISFEASANCE OF AGENT. — Misfeasance may involve the omission to do something which ought to be done; as where an agent, engaged in the performance of his undertaking, omits to do something which it is his duty to do, under the circumstances; as when he does not exercise that degree of care which due regard for the rights of others requires. *Id.*

5. WIFE OF AGENT AS PURCHASER. — An agent empowered to sell cannot convey the property to his wife as her separate estate through the aid of a third person, without the knowledge and consent of his principal, and the latter may avoid such conveyance at his election, no matter whether the price paid was adequate or not. *Tyler* v. *Sanborn*, 97.

6. AGENT CANNOT, DIRECTLY OR INDIRECTLY, have an interest in the sale of property of his principal without the latter's consent freely given, after full knowledge of all facts known to the agent; and it does not matter that no fraud was intended, nor advantage derived from the transaction by the agent; and in such cases the burden of proof is on him to show the knowledge and consent of the principal. *Id.*

7. PAROL EVIDENCE TO VARY CONTRACT. — When a written contract is made in the name of a principal, and signed in his name by another as his agent, it is not competent to show by parol evidence, in order to recover on the contract, that in signing it, the one who purported to sign it as agent signed the name of the principal for his own benefit, with intention to bind himself. *Heffron* v. *Pollard*, 764.

8. PAROL EVIDENCE TO VARY CONTRACT. — If the principal is not disclosed at the time the contract is signed, parol evidence is admissible to show the agency of the signer, and to charge the principal; but if in fact the agency is disclosed when the contract is signed, then such evidence is not admissible. *Id.*

9. PAROL EVIDENCE TO VARY CONTRACT. — When the principal is undisclosed at the time of the signing of a contract, a third party suing thereon may show that there was a principal, in order to bind him, but the agent is not permitted to prove the same fact, in order to free himself from liability. *Id.*

10. PAROL EVIDENCE TO VARY CONTRACT. — An agent may show, in order to relieve himself from liability upon an apparent written contract binding him, that it was agreed, by all the parties, when it was signed, that it should not take effect as a contract, and that the real contract was an unwritten one which bound only his principal. *Id.*

11. WHEN A PRINCIPAL, for the purpose of transacting business, adopts an assumed name, or the name of another, or of his agent, he is bound by the contract made in that name. *Id.*

See HUSBAND AND WIFE, 8; INSURANCE; MALICIOUS PROSECUTION, 4; MUNICIPAL CORPORATIONS, 14; POWER OF ATTORNEY; RAILROAD CORPORATIONS, 1.

AGRICULTURAL SOCIETIES.

See CORPORATIONS, 21.

APPEAL AND ERROR.

1. APPEAL CARRIES UP CASE AS TO PARTY NOT APPEALING WHEN. — If, in a suit by creditors of an insolvent corporation to enforce the statutory liability of its stockholders, one of the defendants pleads that, before the insolvency of the corporation, he, in good faith, sold his shares of stock to another of the defendants, who is solvent, and prays that whatever sum is found to be due as respects the shares so sold may be adjudged against such other defendant, and issue is joined by reply, and a judgment is rendered in the common pleas, from which the vendor appeals to the circuit court, the vendee is a party necessary to the working out of the equities, and such appeal carries up the case as to him, whether he appeals in his own right or not. *Harpold* v. *Stobart*, 618.

2. CROSS-PETITION IN ERROR MUST BE FILED WITHIN TWO YEARS. — Although a cross-petition in error is not expressly authorized by the Ohio Code, such cross-petition will be allowed as petitions in error are allowed in original actions. But such cross-petition must be filed within two years from the rendition of the judgment. The same limitation applies to it that applies to petitions in error in original actions. *Mannix* v. *Purcell*, 562.

3. STAY BOND, INSUFFICIENCY OF, EFFECT OF. — A stay of proceedings is not affected by the fact that the bond first given thereon was insufficient because the sureties were not good, and that a new bond is afterwards given. If a bond be given at the proper time, and in due form, the proceedings shall be stayed, without reference to the sufficiency or insufficiency of the sureties, and if, after exception to the sureties, the same or other sureties justify within the time allowed, the stay will continue, and the liability of the new sureties will relate back to the time of the first stay. *Chuck* v. *Quan Wo Chong Co.*, 50.

4. APPELLATE JURISDICTION OF SUPREME COURT IS NOT DEPENDENT UPON COUNTERCLAIM set up by the defendant; and a motion to dismiss an appeal upon the ground that defendant's demand upon his counterclaim does not amount to three hundred dollars will be denied. In an action brought to recover a money demand, the *ad damnum* clause of the complaint is the test of jurisdiction; and if the amount sued for is large enough to give the superior court jurisdiction, the supreme court has jurisdiction on appeal, whether the appeal be taken by the plaintiff or defendant. *Lord* v. *Goldberg*, 82.

5. NUNC PRO TUNC ENTRY OF ORDER APPEALED FROM. — Where an order appealed from was actually made, but was not entered upon the record, the supreme court may grant leave to have the order entered *nunc pro tunc* and certified up. *Chuck* v. *Quan Wo Chong Co.*, 50.

6. JUDGMENT NOT REVIEWED WHEN EVIDENCE CONFLICTING. — Where, in an action against a railroad company for damages for the negligent escape

of fire from its engine, the evidence is conflicting, whether, if such engine was furnished with the most approved appliances to prevent the escape of fire and was carefully operated by skillful and experienced men the fire could have escaped in the manner testified to, and judgment for damages is rendered, it will not be revised on the ground that it is not supported by the evidence. *Missouri Pac. R'y Co.* v *Platzer*, 771.

7. ADMISSION AND SUBSEQUENT WITHDRAWAL OF INCOMPETENT EVIDENCE will only work a reversal in cases where the evidence is of such character and the whole case so presented as to induce the belief that the jury may have been influenced by its erroneous admission. *Dillingham* v. *Russell*, 753.

8. INSTRUCTIONS. — The inadvertent use of the word "debtor," instead of "creditor," in an instruction, is not ground of complaint, when no harm could have resulted from the mistake. *Harris* v. *Daugherty*, 812.

9. WHEN A BILL OF EXCEPTIONS appears in statement of facts which has been filed during the term, it will be presumed that the whole was presented within ten days after the trial was concluded, or in other words, within the time provided by statute. *Heffron* v. *Pollard*, 764.

10. WHEN STATEMENT IN BILL OF EXCEPTIONS and that in the statement of facts are not inconsistent, both should be looked to and should be taken together as constituting the bill of exceptions upon any particular matter mentioned in either. *Id.*

11. FAILURE TO STATE IN BILL OF EXCEPTIONS the ground of objection to the admission of evidence is not reason for striking out the bill, though it may have an important bearing in determining the correctness of the court's ruling in any particular case. *Id.*

See CONTEMPT, 5; MOTIONS AND ORDERS, 3.

ARBITRATION AND AWARD.

1. AGREEMENT BY A CONTRACTOR AND A SUBCONTRACTOR THAT ANY DISPUTE THAT SHOULD ARISE between them should be decided by the chief engineer of the railway corporation for which the work was to be done, is binding on both parties. It is, in one sense, more obligatory than an ordinary submission to arbitration, because, being on consideration, it is not revocable, and no obligation to pay arises until the estimate is made by the chief engineer. *Sweet* v. *Morrison*, 376.

2. ARBITRATOR, DUTIES OF A CHIEF ENGINEER AS. — If parties contracting to do work upon a railway agree that the amount which is to become due from one to the other, and all disputes arising on the contract, shall be decided by the chief engineer of the railroad corporation, this agreement must be construed in the light of surrounding circumstances, and if the one to whose decision they thus refer is the chief engineer of a road extending from the Missouri River to the Pacific Ocean, they must be understood as intending that he should obtain his information in the usual way from his subordinates, and it is therefore no objection to a report made by him that he did not personally make the measurements and estimates upon which such report was based. *Id.*

3. CHIEF ENGINEER OF THE RAILWAY CORPORATION, TO WHOSE ARBITRAMENT the contracting parties have left the amount which is to become due them, may refuse to hear evidence, and rely solely upon the estimates and reports of his subordinates. *Id.*

4. AN AWARD WILL NOT BE SET ASIDE FOR A MISTAKE WHICH DOES NOT APPEAR on its face, or in some paper delivered with it. *Id.*

5. ONE SEEKING TO SET AN AWARD ASIDE FOR MISTAKE must show from the award itself that but for the mistake the award would have been different. *Id.*

6. AWARD. — THE ESTIMATE OF THE CHIEF ENGINEER OF A RAILROAD CORPORATION, TO WHOSE DETERMINATION the contracting parties have submitted the amount which shall become due under a contract, is conclusive, in the absence of corruption, bad faith, or misconduct on his part, or palpable mistake appearing on the face of the estimate, and neither party will be allowed to prove that he decided erroneously as to the law or the facts. *Id.*

ARREST.

1. LIABILITY OF PRIVATE PERSON FOR MAKING. — When a private person is ordered by a sheriff to make an arrest, and acts in obedience to such order in arresting and handcuffing the prisoner, he is justified in so doing, though the act of the officer was without authority. *Firestone* v. *Rice*, 266.

2. LIABILITY OF PRIVATE PERSON FOR MAKING. — A private person called upon by a sheriff to make an arrest is not required at his peril to ascertain whether such officer has a proper warrant, or whether the offense charged is a felony, and he cannot refuse to act until he shall be satisfied that the officer is acting legally, or within the scope of his office. *Id.*

3. LIABILITY OF PRIVATE PERSON FOR MAKING. — A private person who responds to the call of one whom he knows to be an officer, to assist him in making an arrest, is protected by the call from liability for rendering the requisite assistance; and though the officer is acting illegally, the person assisting him at his command, relying upon his official character and call, is protected against suits for trespass and false imprisonment, if, in his acts, he confines himself to the order of the officer. *Id.*

4. RIGHT TO ARREST WITHOUT PROCESS. — When the statute punishes an offense by imprisonment in the state prison, unless it is expressly declared to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process. *Id.*

5. DISCRETION OF OFFICER AS TO MEANS EMPLOYED IN MAKING. — Some discretion is reposed in an officer in making an arrest for felony as to the means taken to apprehend the offender and keep him safe and secure thereafter. This discretion cannot be questioned, unless abused through malice, or reckless indifference to the common dictates of humanity, and without any view to prevent the escape of the supposed offender. *Id.*

6. RIGHT OF OFFICER TO HANDCUFF PRISONER. — An officer having reasonable cause for arresting a person for felony is justified in handcuffing the prisoner to prevent his escape, though he is not unruly, makes no attempt to escape, and does nothing indicating necessity for such restraint; nor need he be a notorious bad character in order to justify the handcuffing. Other reasons may exist why extreme measures should be resorted to to secure and safely lodge the prisoner. *Id.*

7. DUTY OF OFFICER TO MAKE. — It is the duty of an officer to take a supposed felon, safely keep him, and bring him before a magistrate, and he cannot stop when the accused is unknown to him, at the moment of arrest, to inquire into his character, his intent to escape, or his guilt or innocence. *Id.*

8. RIGHT OF OFFICER TO HANDCUFF PRISONER. — An officer, having reasonable cause to believe a person to be guilty of felony, may, in arresting, handcuff him; and if this is done without wantonness or malice, the officer cannot be held liable in damages for what, at the time, seemed to him reasonable and right, though it transpires that his precautions were unnecessary in the light of after-acquired knowledge of the true character and intent of the accused. *Id.*

ASSAULT.

1. DAMAGES. — When a party, by an act which he could have avoided, and which he cannot justify, inflicts an immediate injury upon another by force, he is legally answerable in damages to the party injured. *Goldsmith* v. *Joy*, 923.

2. WORDS OF PROVOCATION are no legal excuse for the infliction of personal violence. *Id.*

3. ASSAULT — DAMAGES. — WORDS OF PROVOCATION cannot be given in defense to the claim of actual or compensatory damages for an assault, but only in mitigation of exemplary damages. *Id.*

4. EXEMPLARY DAMAGES — CHARACTER OF PARTIES. — In assessing exemplary damages for an unprovoked assault, the character and standing of the parties involved should be considered by the jury. *Id.*

See CRIMINAL LAW, 5–13.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. PROPERTY HELD IN TRUST DOES NOT PASS BY ASSIGNMENT FOR BENEFIT OF CREDITORS. — No property held in trust for others by one who makes an assignment for the benefit of his creditors passes by such assignment, and the beneficiaries of such property are free to assert against the assignee every right and claim which before the assignment they could have asserted against the assignor. *Mannix* v. *Purcell*, 562.

2. BURDEN OF PROOF. — One who attacks an assignment for the benefit of creditors as being fraudulent must assume the burden of proof, if the assignment is valid on its face. *Bernheimer* v. *Rindskopf*, 414.

3. FRAUD IN AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS WILL NOT BE PRESUMED. It must be proved, and if there is room left for an honest intention, the proof of fraud is wanting. *Id.*

4. INDORSEMENT OF A NOTE GIVEN FOR A DEBT OF ONE OF THE PARTNERS in the firm name, which is mentioned as a preferred debt, in an assignment by the firm for the benefit of creditors, will be presumed, in an action to avoid such assignment as fraudulent, to have been made with the assent of all of the members of the firm. *Id.*

5. INDORSEMENT OF A NOTE IN THE FIRM NAME TO SECURE A LIABILITY OF AN INDIVIDUAL PARTNER, when the firm is insolvent, is not fraudulent as against firm creditors, providing that it is done for an honest purpose, and with the consent of the members of the firm, and the indorsee did not know that the firm was insolvent. *Id.*

6. CONSIDERATION FOR INDORSEMENT FOR PARTNERSHIP. — The surrender of a note of a partner which was then due, and the taking of a new note in place thereof, payable in one year, is a sufficient consideration to support the indorsement of the latter by the firm, and the creditors of the partnership cannot avoid, as a fraud upon them, an assignment by the firm in which the indorsed note is one of the preferred debts. *Id.*

7. STATEMENT OF THE NATURE OF LIABILITY. — There is no fraudulent misstatement of the nature of liability when a note is described as having been discounted by the assignors and held by M. N., when in truth such note was indorsed by the assignors, and was in favor of M. N., and was taken by him in payment of the pre-existing debt of one of a firm consisting of the assignors. *Id.*

8. ASSIGNMENT BY A BANK FOR BENEFIT OF CREDITORS. — WHERE A BANK, TO WHICH DRAFTS OR CHECKS HAVE BEEN SENT for collection, makes a general assignment for the benefit of its creditors, its assignee does not acquire any title to such paper; and if the collections made thereon by collecting agents are paid to him, he is answerable for the amounts thereof to the owners of such drafts and checks, and is not relieved from liability by the fact that he paid out such moneys in good faith, and as authorized by the court having jurisdiction over him as such assignee. *Butchers' and Drovers' Bank* v. *Hubbell*, 515.

9. ASSIGNEE FOR THE BENEFIT OF CREDITORS CAN ACQUIRE NO BETTER TITLE TO A DRAFT OR CHECK INDORSED TO HIS ASSIGNOR FOR COLLECTION than the latter had; and if he disposes of or pays out paper or money, though in good faith, and not under order of court, to which his assignor had no title, he is answerable to the owner thereof. *Id.*

10. ASSIGNEE FOR THE BENEFIT OF CREDITORS IS NOT ENTITLED TO DEMAND, before an action can be sustained against him for moneys or property, the legal title to which was never in his assignor. *Id.*

11. ORDER OF COURT THAT AN ASSIGNEE FOR THE BENEFIT OF CREDITORS PAY A CERTAIN DIVIDEND cannot protect the assignee in paying out moneys to which his assignor had no title. *Id.*

12. FOREIGN ASSIGNMENT FOR BENEFIT OF CREDITORS. — In the absence of claims of domestic creditors, the assignee under a valid foreign assignment may reduce to his possession the property and collect the debts assigned to him in Illinois, and debtors there, owing the assignor, and having no set-off, will be compelled to pay the assignee; but if the assignment, if made in the latter state, would be set aside as fraudulent, or contrary to the policy of the law, then it will not be enforced as against attaching creditors, foreign or domestic, although it may be valid in the state where made. *Woodward* v. *Brooks*, 104.

13. VOLUNTARY FOREIGN ASSIGNMENT FOR BENEFIT OF CREDITORS, valid in the state where made, is only enforced in Illinois as a matter of comity, and it will not be enforced to the prejudice of citizens who may have demands against the assignor; but for all other purposes, and between citizens of the state where the assignment was made, if valid by the *lex loci*, will be carried into effect by the courts of Illinois. *Id.*

ASSUMPSIT.

See FRAUD, 2.

ATTACHMENT.

1. A SUFFICIENT AFFIDAVIT is essential to support a writ of attachment. *Beebe* v. *Morrell*, 288.

2. AFFIDAVIT FOR ATTACHMENT IS PROPERLY FILED when left with the clerk, and by him received to be kept on file, and the fact that he did not indorse upon the affidavit the time it was received, and neglected to keep it on file, and attached it, or permitted to be attached, to the writ, does

not affect the validity of the latter. It is presumed that the affidavit was filed before the writ issued. *Id.*

3. PROCESS. — SERVICE BY PUBLICATION subsequent to attachment is sufficient to give jurisdiction to proceed to render judgment subjecting the property attached to the payment of the debt. *Harris* v. *Daugherty*, 812.

4. ATTACHMENT LIENS. — Prior to the adoption of the Revised Statutes of Texas it was not necessary, in order to give effect to an attachment lien, that the judgment should expressly recognize or enforce the lien; and in the absence of something in the judgment showing the attachment to have been abandoned, the lien continued in force and held the property subject to the payment of such indebtedness as the judgment should show to exist. *Id.*

5. WRIT OF ATTACHMENT, regular upon its face, and upon which a judgment has been based, is presumed to have been properly issued, and a party relying thereon need not show the proper affidavit and bond, when offering the writ in evidence. *Id.*

See CHATTEL MORTGAGES, 1, 2; EXEMPTIONS; FRAUDULENT CONVEYANCES, 4; RECEIVERS.

ATTORNEY AND CLIENT.

PRIVILEGED COMMUNICATIONS. — Where a witness is the attorney for both parties in a transaction, communications made to him in the course of such business are privileged, except in a suit between the parties; but when the evidence is conflicting as to whether he is such attorney, his evidence may be properly admitted. *Harris* v. *Daugherty*, 812.

See LIMITATION OF ACTIONS, 1, 2.

BANKRUPTCY AND INSOLVENCY.

1. INSOLVENT CORPORATION CANNOT PREFER ONE CREDITOR TO ANOTHER. — When a corporation, for profit, organized under the laws of Ohio, becomes insolvent and ceases to carry on its business, or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors in proportion to the amounts of their respective claims, and it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors. *Rouse* v. *Merchants' Nat. Bank*, 644.

2. INSOLVENCY PROCEEDINGS. — FOREIGN CREDITOR WHO ACCEPTS THE BENEFIT OF A DIVIDEND resulting from an offer of composition of an insolvent debtor with his creditors made in insolvency proceedings, authorized by the statute of Massachusetts, is bound by a discharge of such debtor subsequently granted in such proceedings, because, by such acceptance, he waives his right to object that the legislature of that state had no constitutional right to pass the statute discharging the debt. *Murray* v. *Roberts*, 209.

3. INSOLVENCY STATUTE, CONSTRUCTION OF — DISCHARGE, WHAT DEBTS INCLUDED IN. — Where a statute authorizes the discharge of an insolvent debtor from all debts, which have been or shall be proved against his estate, a debt must be regarded as proved, and therefore affected by his subsequent discharge, if the holder thereof knowingly accepts a dividend resulting from the composition of such debtor with his creditors pursuant to an offer made by the debtor in such proceeding. *Id.*

BANKS AND BANKING.

1. DEPOSITOR IN SAVINGS BANK, WHOSE DEPOSIT IS ENTERED AS "IN TRUST FOR B," constitutes himself a trustee, and transfers the title to the fund from himself individually to himself as trustee. *Schluter* v. *Bowery Sav. Bank*, 494.
2. PAYMENT TO AN ADMINISTRATOR OF A DEPOSITOR, in whose name moneys are deposited in trust for another, is good and effectual to discharge the bank, in absence of notice from the beneficiary. *Id.*
3. PAYMENT TO A FOREIGN ADMINISTRATOR is a legal payment of a deposit which, by the by-laws of the bank, was payable to the personal representatives of the depositor in the event of his decease. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 8, 9; NEGOTIABLE INSTRUMENTS, 4, 6–8.

BILLS OF EXCEPTIONS.

See APPEAL AND ERROR, 9–11.

BONA FIDE PURCHASER.

See DEEDS, 6; MARRIED WOMEN, 1

BROKERS.

See CONTRACTS, 5, 7, 9; PARTNERSHIP, 8.

CANCELLATION OF INSTRUMENTS.

See EQUITY, 3.

CAPIAS AD SATISFACIENDUM.

See EXECUTIONS, 13.

CARRIERS.

1. COMMON CARRIER. — Delivery of goods, at the place designated, in good condition, is necessary to relieve a common carrier from liability as such; and if the consignee, after due notice, refuses or neglects to receive them, the carrier may relieve himself from responsibility by placing them in a warehouse for or on account of the consignee; but so long as the carrier has the custody, the duty devolves upon him to take care of the property and preserve it from injury. *Scheu* v. *Benedict*, 426.
2. COMMON CARRIER, LIABILITY, HOW LONG CONTINUES. — Though goods arrive at their place of destination, of which the consignee has notice, and they are put at his disposal to be taken away, and though he does take part of them, he has a reasonable time to remove the residue, and the carrier remains answerable for the goods until they are delivered in some form or another. So held where a cargo of malt was partly removed by its consignee on the day of its arrival, and the balance, not being removed for seven days, was then found to be injured from dampness, and where the jury had by their verdict found that the consignee had not been guilty of unreasonable delay under the circumstances of the case in not sooner removing such balance. *Id.*
3. CONNECTING LINES. — No distinction exists between the carriage of goods and passengers as to the liability of a railroad selling a through-ticket beyond its terminus, and over connecting lines, and as to the liability of

the receiving company for freight shipped beyond its own terminus over connecting lines. *Harris* v. *Howe*, 862.

4. CARRIERS CONTRACTING TO CARRY BEYOND THEIR OWN LINES are estopped from denying their obligation to perform their contract. *Id.*

5. LIABILITY BEYOND TERMINUS. — Common carrier of goods or passengers may, by express contract, bind himself to carry any distance or to any destination, whether the carriage is to be accomplished by his own means of conveyance, or will require the employment of agents or subsidiary carriers beyond its own line; or it may, by express contract, limit its liability to its own line. *Id.*

6. CARRIER'S OBLIGATION TO CARRY PASSENGERS OVER ITS OWN LINE cannot be modified by contract so as to exempt it from duty to protect the passenger from the consequences of the negligence of its servants or agents. *Id.*

7. LIABILITY OVER CONNECTING LINE. — A common carrier may, by express contract, confine its liability for negligence to a passenger to its own line, and make itself simply the agent of the connecting carrier so as to exempt itself from liability for the negligence of the operator of the connecting line. *Id.*

8. DUTY TO PASSENGERS AT THEIR DESTINATION. — A railroad company should stop its train and give a passenger a reasonable time to leave the train in safety at the place of his destination, and it is the duty of the passenger to exercise reasonable diligence and care. *Pennsylvania R. R. Co.* v. *Lyons*, 701.

9. NEGLIGENCE IN JUMPING FROM MOVING TRAIN, WHEN QUESTION FOR JURY. — In an action to recover for personal injuries received in jumping from a moving train, wnere negligence is charged on both sides, and the evidence is conflicting as to whether or not the train was stopped a reasonable time to allow the passenger to alight in safety, the whole question should be left to the jury for its determination. *Id.*

10. WHEN NEGLIGENCE OF PASSENGER IN ALIGHTING FROM MOVING TRAIN IS FOR JURY. — When a passenger is placed in peril by the default or negligence of a railroad company, or when he leaves the train while it is in motion by direction of the company's agents, it is for the jury to determine, upon the evidence, whether the act was negligent or not. In such cases, all the circumstances, including the speed of the train at the time of leaving it, must be considered. *Id.*

11. WHEN PASSENGER IN ALIGHTING FROM A RAILWAY TRAIN is injured, and alleges that it was caused by the neglect of the company to stop its train long enough to enable him to alight in safety, he must prove such neglect to the satisfaction of the jury, or fail in his action. When, therefore, it is found that sufficient time was given him to alight in safety, that he did not do so, but remained on the train until it was in motion, and then jumped, and was injured, he is guilty of contributory negligence, and cannot recover. *Id.*

12. RAILROAD CORPORATION MUST GIVE PASSENGERS A REASONABLE OPPORTUNITY FOR ALIGHTING from its train at a station where it stops, and reasonable diligence on the part of its passengers in alighting from it is also required. *McDonald* v. *Long Island R. R. Co.*, 437.

13. A RAILROAD CORPORATION IS NOT EXCUSED FROM GIVING PASSENGERS A REASONABLE TIME TO ALIGHT from its train at a station by the fact that its conductor did not know the passenger intended to alight, unless the latter was so situated as to conceal himself from observation.

The fact that a passenger proceeds to leave a train at a station where it has stopped ought to be known by the company through its servants, and therefore, so far as it is essential, it is deemed chargeable with knowledge. *Id.*

14. CONTRIBUTORY NEGLIGENCE OF PASSENGER IN ALIGHTING FROM RAILROAD TRAIN. — One about to alight from a train at a station where it has stopped has the right to assume that he will be allowed a reasonable time in which to do so before the train starts, and is therefore not chargeable with contributory negligence if he omits to retain his hold on the railing, or to seek the conductor and inform him of his purpose to leave the train, or to see that his movements to leave the train are observed by the conductor. *Id.*

15. DUTY AS TO PASSENGERS AT INTERMEDIATE STATIONS. — Where a railroad company contracts with a passenger to carry him to his point of destination, he is not expected to leave the cars at intermediate stations, and the company does not engage to afford him opportunity to do so, except at the usual places for refreshments. *Missouri Pacific R'y Co.* v. *Foreman*, 785.

16. DUTY TO THROUGH-PASSENGERS AT WAY-STATIONS. — A through-passenger has no right to leave the cars at a way-station where refreshments are not served, and if he asks the conductor how long the train will stop at such station, the latter is not presumed to know that it is the desire of the inquirer to alight and consume the time of the stop on business away from the cars; and, in such case, the answer given by the conductor neither increases nor diminishes the duty or liability of the company to the passenger. If injury results from reliance upon the answer made by the conductor, the passenger cannot recover. *Id.*

17. DUTY TO PROTECT PASSENGERS FROM VIOLENCE AND INSULT. — It is the duty of carriers of passengers by railway, whether the latter is in the hands of the owners or of a receiver, to protect them in so far as possible, by the exercise of a high degree of care, from the violence and insults of other passengers, strangers, or the carrier's own servants; and the inquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established. *Ditlingham* v. *Russell*, 753.

18. DUTY TO PROTECT PASSENGERS, AND MEASURE OF DAMAGES. — A common carrier is liable to an injured passenger for actual damages, when there is a failure on its part, through its conductor, or some other representative, to give that protection to the passenger which, as a common carrier, it is bound to give; and this liability does not depend on whether the servant's failure of duty was intentional, willful, or malicious; but to make it liable for exemplary damages, the willful or malicious act of the servant must have become, in law, the act of the carrier. *Id.*

19. LIABILITY OF, FOR WILLFUL ACT OF SERVANT. — If, in performing any duty within the line of his employment, the servant of a common carrier uses unnecessary force in doing an act lawful within itself, and thereby commits a trespass or crime, such act may be deemed one for which the carrier is civilly liable; but if the act is in itself illegal, however or by whomsoever done, the carrier is not liable unless it advised or in some way participated in such act. If such act is willfully done by the servant, outside the line of his employment or duty, the malice will not be imputed to the carrier; nor is it a ratification of such act that, after

knowledge of it, the servant is allowed to remain in his employment. *Id.*

20. RATIFICATION OF SERVANT'S MALICIOUS ACT. — Where the servant of a common carrier has committed a wrongful and malicious act in the line of his employment and duty, it cannot be held, as matter of law, that his mere retention in the same position, after knowledge of his misconduct, operates as a ratification of such act, and fixes his evil motive on the carrier. This question should be left to the jury under the evidence. *Id.*

21. PASSENGER ON STREET-RAILROAD IS NOT BOUND TO TENDER EXACT FARE, but he must tender a reasonable sum, and if he does so, the carrier is bound to accept the tender, and furnish change to a reasonable amount. *Barrett* v. *Market Street R'y Co.*, 61.

22. TENDER OF FIVE-DOLLAR GOLD PIECE BY PASSENGER ON STREET-CAR, who has no smaller change with him, is a tender of a reasonable sum, and if he makes such tender he cannot be ejected for refusal to pay his fare. *Id.*

23. DUTY OF STREET-RAILROAD COMPANY TO ACCEPT AND CARRY PASSENGERS must have a reasonable performance, and it is not in all cases reasonable for the carrier to demand the exact fare as a condition of carriage. It is immaterial, in such case, whether the fare is demanded in advance or not, as the rule in regard to the performance of contracts has no necessary application. *Id.*

24. DISTINCTION SHOULD BE MADE BETWEEN PASSENGERS ON STREET-RAILROADS AND THOSE ON STEAM RAILROADS in the matter of the tender of fare. *Id.*

See TELEGRAPH COMPANIES, 8; TELEPHONE COMPANIES, 1.

CHARITABLE USES.

1. PAROL EVIDENCE ADMISSIBLE TO INGRAFT TRUST ON TITLE HELD BY DEED ABSOLUTE ON ITS FACE. — Parol evidence is admissible to show that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses, but such evidence must be clear, strong, and convincing. And if such grantee is an archbishop of the Roman Catholic Church, its rules and canons regulating the mode of acquiring and holding church property are admissible evidence to show that the property so conveyed to him is held by him in trust for purposes of religious worship and other charitable uses. *Mannix* v. *Purcell*, 562.

2. USES WHICH WILL BE UPHELD BY COURTS. — Property held by a Roman Catholic archbishop in trust for the purposes of public religious worship, schools, orphan asylums, and cemeteries, is held for uses that will be upheld by the courts, which will see that those uses are not abused, perverted, or destroyed. *Id.*

3. PROPERTY HELD BY ROMAN CATHOLIC ARCHBISHOP FOR CHARITABLE USES IS NOT SUBJECT TO PAYMENT OF DEBTS contracted by him in the business of receiving money on deposit upon the terms of paying interest upon it while on deposit, and finally restoring the principal. Such debts cannot be regarded as diocesan debts, to be satisfied out of diocesan or general church property. *Id.*

4. ONE PIECE OF PROPERTY HELD UPON SEPARATE TRUSTS IS NOT LIABLE FOR IMPROVEMENT OF ANOTHER. — Where property is held by a Roman Catholic archbishop, in trust, to be devoted to the uses of public religious

worship, cemeteries, orphan asylums, and schools, each church, cemetery, asylum, and school is held upon a separate trust and for its own separate uses, and one piece of such property is not chargeable with any part of the expense of improving another, nor of improving church property generally in the diocese. *Id.*

5. BENEFICIARIES OF TRUST PROPER PARTIES TO ACTION WHEN. — Where property is held by a Roman Catholic archbishop in trust for the uses of public religious worship, schools, orphan asylums, and cemeteries, although the persons respectively possessing and having charge of such schools, asylums, and cemeteries are unincorporated and otherwise incapable of holding the legal title to the property, they have such an interest therein as will permit them to be represented in court by a number less than the whole of them for the purpose of protecting the property from being seized and sold for the satisfaction of the private debts of the trustee; and changes in the membership of such congregations and bodies do not affect their legal identity. *Id.*

6. CLAIM OF TRUSTEE FOR ADVANCES MADE TO PURCHASE OR IMPROVE TRUST PROPERTY. — A trustee for charitable uses who has made advances from his own private means, otherwise than as donations, for the purpose of purchasing or improving the trust property, has a claim upon the particular property purchased or improved, which will pass to his assignee as individual assets; and in an action by the assignee to subject his assignor's assets to the payment of the latter's debts, the court may order an account of the advances so made for the purpose of subjecting such property to the satisfaction of such debts. *Id.*

7. TRUSTEE FOR CHARITABLE USES MAY CHARGE TRUST PROPERTY with the reasonable expense of its necessary preservation and improvement, in favor of one who expends money, furnishes materials, or performs labor for that purpose. *Id.*

CHATTEL MORTGAGES.

1. POWER OF SALE. — A chattel mortgage, duly recorded, declaring that the mortgagor may remain in possession, and sell the mortgaged property as opportunity presents, the property as sold to be replaced with other of like kind and of sufficient value to keep the security of the mortgagee good, but not providing that the avails of sales shall be accounted for by the mortgagor, is *prima facie* valid as against an attaching creditor of the mortgagor. *Peabody* v. *Landon*, 903.

2. POWER OF SALE — AFTER-ACQUIRED PROPERTY. — A recorded chattel mortgage providing that the mortgagor may sell the mortgaged property from time to time, replacing that sold with other of like kind and value, the substituted property to be subject to the terms of the mortgage, is valid, and where the mortgagee takes possession with the consent of the mortgagor, he can hold the property, original and substituted, as against a subsequent attaching creditor of the mortgagor. *Id.*

COMMERCIAL LAW.

COMMERCIAL LAW — ORIGIN OF. — There is no such thing as general commercial or general common law, separate or irrespective of a particular state, or government, whose authority makes it law. Commercial law exists only in name, and the sanction given its principles by their adoption by the courts of the different states. *Forepaugh* v. *Delaware etc. R. R. Co.*, 672.

COMMON LAW.

See COMMERCIAL LAW.

COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY, 2, 3.

CONFLICT OF LAWS.

1. CONTRACT OF CORPORATION AFFECTED BY LAW OF STATE CREATING IT.— A contract or lease made in Texas by a citizen thereof and a railway company which owes its existence and derives its powers from the laws of another state, if void in such other state is void in Texas, and no acts of ratification can validate or make it effective. *Rue* v. *Missouri P. R'y Co.*, 852.
2. CONFLICT OF LAWS. — A MARRIED WOMAN IS CAPABLE OF BEING A TRUSTEE UNDER THE LAWS OF THE STATE OF NEW YORK, and her removal to another state, after becoming a trustee in New York, does not divest her of her title as such trustee. *Schluter* v. *Bowery Sav. Bank*, 494.
3. DISTINCTION BETWEEN BINDING EFFECT OF DECISIONS ON COMMERCIAL LAW, and on statutes made by the supreme court of the United States, is utterly untenable. The law declared by state courts to govern on commercial contracts made within their jurisdiction is conclusive everywhere, and just as binding as decisions on statutes. *Forepaugh* v. *Delaware etc. R. R. Co.*, 672.
4. VALIDITY OF A CONTRACT SHOULD BE DETERMINED by the laws of the state in which it was made and was to be performed. *Id.*
5. Courts will enforce contracts valid by the laws of the state or country wherein they were made, unless they are injurious to the interests of the citizens of the state wherein the remedy is sought. *Id.*
6. A contract made with a common carrier in New York, and to be performed in that state, releasing the carrier from responsibility for negligence, will be enforced in this state; and if no recovery can be had under such contract in New York, none will be permitted in the courts of this state. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 12, 13.

CONSTITUTIONAL LAW.

1. CONSTRUCTION OF STATUTE — ACTUAL COST, WHAT IS. — A statute of New York declaring that the owners of elevators shall not charge for trimming and shoveling to the leg of the elevator more than actual cost, does not permit a charge for such work to include the sum paid for the use of a steam-shovel belonging to the elevator company. The words used in the statute exclude any charge by the company beyond the sum specified for the use of its machinery in shoveling, and the ordinary expense of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. *People* v. *Budd*, 460.
2. CONSTITUTIONAL LAW — MAXIMUM CHARGES. — LEGISLATIVE POWER EXISTS under the constitution of the state of New York to prescribe a maximum charge for elevating grain by a stationary elevator owned by individuals or corporations who have appropriated their property to this use, and are engaged in this business. *Id.*

3. CONSTITUTIONAL LAW. — PROTECTION OF PRIVATE PROPERTY IS ONE OF THE MAIN PURPOSES OF GOVERNMENT, BUT NO ONE HOLDS HIS PROPERTY BY SUCH ABSOLUTE TENURE as to be free from the power of the legislature to impose restraints and burdens required by the public good, and proper and necessary to secure equal rights to all. *Id.*

4. CONSTITUTIONAL LAW — LEGISLATIVE POWER. — When a statute is challenged as overstepping boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, and the principles of legislation and legal adjudications, are pertinent and important considerations and elements in the determination of the controversy. *Id.*

5. CONSTITUTIONAL LAW. — DECISION OF A FEDERAL COURT SUSTAINING A STATE STATUTE IS NOT RES ADJUDICATA AND BINDING ON A STATE COURT, when the same question subsequently arises under a similar statute. Only when required by the most cogent reasons, and compelled by unanswerable grounds, will the state court declare the statute to be unconstitutional, when its constitutionality has been sustained by the supreme court of the United States. *Id.*

6. THE POLICE POWER is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state necessary for the public welfare. *Id.*

7. CONSTITUTIONAL LAW. — THE BOUNDARIES OF POLICE POWER are not susceptible of precise definition, and the courts therefore must, as each case is presented, determine whether it falls within or without the appropriate limits. *Id.*

8. CONSTITUTIONAL LAW. — NO GENERAL POWER RESIDES IN THE LEGISLATURE TO REGULATE PRIVATE BUSINESS, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract. *Id.*

9. CONSTITUTIONAL LAW. — STATUTES REGULATING THE PRICE FOR ELEVATING AND STORING GRAIN IN ELEVATORS are justifiable, because they are charged with a public interest. The elements which affect this business with a public interest are found in its nature and extent, its relations to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. *Id.*

10. POWER OF THE LEGISLATURE TO ALTER THE RULES OF EVIDENCE as they existed at common law, and to limit, change, and vary existing rules for the limitation of actions, is not affected nor destroyed by the constitutional provision prohibiting the taking of life, liberty, or property without due process of law. *People* v. *Turner*, 498.

11. WHO MAY URGE INVALIDITY OF A STATUTE. — No one but the owner of property is entitled to set up that it has been taken by virtue of an unconstitutional statute. This rule is the necessary result of the rule that the owner may waive the constitutional protection to his property, if he chooses. *Id.*

12. STATUTE MAKING A DEED CONCLUSIVE EVIDENCE OF TITLE. — A statute is constitutional which provides in regard to certain conveyances that "all conveyances that have been heretofore executed by the comptroller, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto were regular, and were regularly given, published, and served according to the provisions

of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances heretofore or hereafter executed, shall be presumptive evidence of the regularity of the said proceedings, and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from date of recording such other conveyances." *Id.*

See COUNTIES.

CONTEMPT.

1. CORPORATIONS CAN ONLY BE PUNISHED FOR CONTEMPT through their officers, or those acting in aid of such corporations. *Sercomb* v. *Catlin*, 147.
2. AGENT OR MANAGER OF FOREIGN CORPORATION within the jurisdiction, and who commits a contempt of court, may be punished therefor, without making the corporation *eo nomine* a party to the proceeding, although it was named as plaintiff in an action constituting the contempt. *Id.*
3. CONTEMPT OF COURT, PUBLISHING LIBEL ON JUDGE IS, WHEN. — The publication by a newspaper correspondent of a libel upon the presiding judge of a court engaged at the time in the trial of a cause, with intent to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus bring it into contempt, to inflame the prejudices of the people against it, to lead them to believe that the trial then being conducted was a farce and an outrage, having its foundation in fraud and wrong on the part of the judge and other officers of the court, to prejudice the minds of the jury, and thus prevent a fair and impartial trial, and to irritate the mind of the judge, and thus to more or less unfit him for the exercise of a clear and impartial judgment, tends directly to obstruct the administration of justice in reference to the case on trial, and is a contempt of court. *Myers* v. *State*, 638.
4. MISBEHAVIOR SO NEAR TO COURT AS TO OBSTRUCT ITS BUSINESS IS CONTEMPT. — The publication of an article calculated to obstruct the administration of justice comes within the statutory provision: "A court or judge at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice"; although the article be not written or circulated by the writer in the presence of the court, where the publication was in the court-room as well as elsewhere, and was intended to have effect, and did in fact have effect, there. *Id.*
5. PROCEEDINGS IN CONTEMPT ARE REVIEWABLE ON ERROR. — The discretion of a judge in imposing punishment for contempt is a reasonable discretion, and its exercise is reviewable. *Id.*
6. JUDGE IS NOT DISQUALIFIED FROM TRYING PROCEEDING IN CONTEMPT by the fact that the misbehavior of the respondent is the publication by him of a libel in large part against the judge, where the offense constituting the contempt consists of the tendency of the act to prevent a fair trial of a cause then pending in the court. And the fact that in committing this offense the respondent also libels the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice. *Id.*
7. JUDICIAL NOTICE, OF WHAT FACTS JUDGE MAY AND MAY NOT TAKE. — In a proceeding for contempt of court, it is competent for the judge

to take judicial notice of pertinent facts connected with the transaction, which came within the cognizance of his own senses. But it is error for him to take judicial notice of the facts which formed the ground of a previous proceeding in the same court for contempt against the respondent, and of his having been found guilty therein; and if it appears that the consideration of those facts may have influenced the judge in the exercise of his discretion in fixing the penalty, the proceeding will be reversed for such error. *Id.*

See RECEIVERS, 5.

CONTRACTS.

1. LEX LOCI GOVERNS VALIDITY, interpretation, and construction of contracts, as a general rule; still, not all contracts valid where made will be enforced by the courts of other states. In respect to the time, mode, and extent of the remedy, the *lex fori* governs. *Woodward* v. *Brooks*, 104.
2. PAROL EVIDENCE TO VARY. — Parol evidence is admissible to show that, at the time of the execution of a written contract, a parol agreement was entered into by the parties and made a part of it. *Redfield* v. *Gleason*, 889.
3. CONTRACT TO DO WORK UPON PROPERTY TO THE ENTIRE SATISFACTION OF ITS OWNER, and in the best workmanlike manner, is satisfied by doing such work in a good and workmanlike manner. The owner cannot avoid payment by arbitrarily and unreasonably saying that he is not satisfied. *Doll* v. *Noble*, 398.
4. BREACH—DAMAGES. — SPECULATIVE OR PROSPECTIVE PROFITS are not proper elements to be computed in assessing damages for a breach of contract; but profits or advantages which are the direct result and fruits of the contract may be assessed for a breach thereof. *Cates* v. *Sparkman*, 806.
5. BROKER'S AGREEMENT TO REPURCHASE OF CUSTOMER. — An agreement by brokers to purchase for a customer a certain amount of mortgaged bonds and to take them off his hands at what they cost him, at any time when he should wish to get rid of them, is an entire contract, and the purchaser may compel the brokers to take such bonds from him and repay him the purchase price thereof. *Johnston* v. *Trask*, 394.
6. WAGERING CONTRACTS, WHAT ARE. — If, though a formal contral is made, for the purchase and sale of merchandise to be delivered in the future, at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by the payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering one. If, however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have the right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver merchandise, and the

other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices. *Harvey* v. *Merrill*, 159.

7. WAGERING CONTRACTS WITH BROKERS, WHAT ARE. — If one employs brokers to procure and enter into contracts for him, which are not in themselves wagering contracts, but the brokers further agree that they will procure these contracts to be set off against each other according to the usage of a board of trade, so that their principal will not be required to receive the merchandise contracted to be bought by him, nor to deliver the merchandise contracted to be sold by him, but that he shall only be required to pay to such brokers, and only be entitled to receive from them the differences between the amount of money which the merchandise was bought and sold for, and that the principal shall furnish a certain margin, and pay certain commissions, the contract with the brokers is a wagering contract, and they cannot recover their commissions, nor any amount due them for losses sustained. *Id.*
8. CONTRACTS WHICH ARE VOID AT COMMON LAW because they are against public policy are illegal as well as void, and money expended under them cannot be recovered. *Id.*
9. BROKERS WHO KNOWINGLY MAKE CONTRACTS WHICH ARE VOID AND ILLEGAL AS AGAINST PUBLIC POLICY, and advance money on account of them, at the request of their principals, cannot recover either the moneys advanced nor commissions for their services. *Id.*
10. PLEADING. — ILLEGALITY OF CONTRACT, to be available as a defense, must be pleaded. *Heffron* v. *Pollard*, 764.

See AGENCY, 7–11; CONFLICT OF LAWS, 3–6; HUSBAND AND WIFE; INFANTS AND INFANCY; INSANE PERSONS.

CONTRIBUTION.

See TORT-FEASORS, 1, 2.

CORPORATIONS.

1. PROPOSED CORPORATION, CONTRACT IN NAME AND FOR BENEFIT OF. — If contract is made in the name and for the benefit of a projected corporation, such corporation, after its organization, cannot become a party to the contract, even by adopting or ratifying it. *Abbott* v. *Hapgood*, 193.
2. CONTRACT MADE BY PROMOTERS OF A PROJECTED CORPORATION in its name and for its benefit must be treated as the contract of such promoters acting either jointly as individuals or as general partners, and they may, even after the organization of the corporation, maintain an action for a breach of such contract. *Id.*
3. RES JUDICATA. — Judgment against a corporation suing upon a contract made before its organization, for its benefit, is not a bar to a subsequent action on the same contract for the same breach thereof, brought by the promoters of the corporation, who, before such organization, had entered into the contract in the name of the corporation, and for its benefit. *Id.*
4. DAMAGES WHICH SHOULD BE AWARDED TO THE PROMOTERS OF A CORPORATION FOR A BREACH OF CONTRACT, entered into by them in the name and for the benefit of the proposed corporation, are not restricted to such as the plaintiffs themselves have suffered independently of their partnership association, but should include all the damages for which

any recovery can be had by any one upon such contract for such breach; and where the contract was to furnish machinery which could not be procured in the market, the parties must be presumed to have contracted in reference to the declared purpose for which the machines were to be furnished, and that purpose may be considered in assessing the damages. *Id.*

5. CORPORATION AND TRUSTEES. — IF A TRUSTEE OF A CORPORATION REPRESENTS to a wife that her husband is in danger of arrest, and that his arrest may be avoided by the payment of certain moneys to the corporation, and recommends her to pay such money to avoid such arrest, and it is accordingly paid, he must be regarded as acting for the corporation, and it will not be permitted to deny his agency. *Adams* v. *Irving Nat. Bank*, 447.

6. CORPORATION, LIABILITY OF, FOR FRAUDULENT ISSUE OF STOCK. — A corporation is answerable in damages if a certificate of its stock is issued to a purchaser thereof by its treasurer, with whom blank certificates, signed by its president, had been left, though all the stock which the corporation was entitled to issue had been previously issued and the treasurer fraudulently issued the certificate in question. The fact that certificates were transferable only upon the surrender of the old certificates, and that no old certificate was ever surrendered, does not relieve the corporation from liability, if the person to whom the stock was issued paid full value therefor and acted in good faith. *Allen* v. *South Boston R. R. Co.*, 185.

7. PURCHASER OF STOCK IN A CORPORATION DOES NOT ASSUME ANY DUTY to see that the vendor of such stock surrenders his certificate and transfers it on the books of the corporation. This is a duty of the corporation towards both the seller and the purchaser, before it issues the new certificate. *Id.*

8. IF STOCK OF A CORPORATION IS FRAUDULENTLY ISSUED BY ONE OF ITS OFFICERS AS SURETY FOR HIS PRIVATE DEBT, the corporation is not estopped, as against the creditor of the officer to whom such stock was issued, to deny the validity of the stock, if the creditor knew that the surrender and transfer of the former certificate were prerequisites to the lawful issue of a new one, and took no steps to assure himself that there was a former certificate to be surrendered and transferred. Such creditor acquires no additional right or equity from the fact the certificate fraudulently issued to him was afterwards surrendered by him, and a new one issued therefor by the officer by whom and for whose benefit the original was fraudulently issued. *Farrington* v. *South Boston R. R. Co.*, 222.

9. MEASURE OF DAMAGES WHEN A CORPORATION IS SUED by one to whom a certificate of its stock has been fraudulently issued by one of its officers is the market value of such stock at the time when it first refused to recognize the certificate in question as valid, and to permit a transfer thereof. *Allen* v. *South Boston R. R. Co.*, 185.

10. LIABILITY OF STOCKHOLDERS OF CORPORATION, EXTENT OF, AND WHEN IT ATTACHES. — A stockholder of a corporation, who has in good faith sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation for such portion only of the debts existing while he held the stock, and remaining due (not in excess of the stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable

in respect of the same debts, who are within the jurisdiction, to be determined at the time judgment is rendered. *Harpold* v. *Stobart*, 618.

11. TRANSFERS OF SHARES OF STOCK, TO BE VALID, MUST BE MADE ON STOCK-BOOK of the corporation, and the creditors of the corporation have the right to rely upon that book as showing who the stockholders are, and the amount of stock held by each. Where, therefore, a vendor of stock causes the secretary of a corporation to enter the transfer of stock sold by him to be made in a book other than the stock-book, with the understanding that such transfer will be made in the stock-book, but no such transfer is made, and at the time of the accruing of the debts of the corporation, and at the time of the trial, the vendor appears, from the stock-book, to be the owner of the shares, such entry is not sufficient to relieve the vendor from liability to the creditors of the corporation, notwithstanding the fact that he sold in good faith and for value, and believed that he had done everything necessary to effect a transfer of the stock, and notwithstanding the further fact that the corporation thereafter treated the purchaser as the owner of the stock sold. *Id.*

12. WHAT NECESSARY TO ENABLE STOCKHOLDER TO MAINTAIN SUIT AGAINST. — To enable an individual stockholder to maintain suit in equity against a corporation, to recover damages for depreciation in the value of stock and corporate property occasioned by the fraudulent practices and conduct of its officers and directors, he must allege and show a refusal, or virtual refusal, of the corporation to sue, that there has been a breach of duty, and that there has been injury to the stockholder suing. *Cates* v. *Sparkman*, 806.

13. SUIT BY STOCKHOLDER AGAINST. — To justify interference with the business of a corporation, there must exist, as a foundation for suit, some action or threatened action by its officers and directors which is beyond the power conferred by its charter, or such fraudulent transaction, contemplated or completed among themselves or with others, as will result in serious injury to the stockholder suing. *Id.*

14. RIGHT OF ACTION AGAINST, FOR FRAUD OR NEGLIGENCE. — Where the officers or directors of a corporation, or some of them, cause a loss of corporate property by negligence or culpable lack of prudence, or fraudulently misappropriate the corporate property in any manner, or obtain undue advantage, benefit, or property for themselves by contract, purchase, sale, or other dealings, under cover of their official functions, or in any manner commit a breach of their obligations, the corporation is the proper party to bring suit. *Id.*

15. WHEN STOCKHOLDER MAY MAINTAIN SUIT AGAINST. — The breach of duty by a corporation authorizing equitable suit by a share-holder for damage in the depreciation of his stock does not refer to mere mismanagement or neglect of the officers or directors in the control of the corporate affairs, or the abuse of discretion lodged in them in the conduct of the corporation business. To authorize such suit, there must be injurious acts *ultra vires*, fraudulent and injurious practices, abuse of power, and oppression on the part of the corporation or its officers, clearly subversive of the rights of the minority or of a stockholder, and which, without such suit, would leave him remediless. *Id.*

16. FOREIGN CORPORATIONS — TAXATION OF — CONSTITUTIONAL LAW. — Section 4 of Pennsylvania act of June 30, 1885, providing for the taxation of the indebtedness of all corporations doing business within the state, and the collection of such tax by the corporation, is a proper exercise of legis-

lative power, and applies as well to foreign as to domestic corporations doing business within the state. *Commonwealth* v. *New York etc. R. R. Co.*, 724.

17. CONDITIONS WHICH MAY BE IMPOSED UPON. — A corporation of one state cannot do business in another without the latter's consent, express or implied. That consent may be accompanied with such conditions as the state may impose, so long as they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the state, or do not enforce condemnation without opportunity for defense. *Id.*

18. TAXATION OF — CONDITION WHICH MAY BE IMPOSED UPON. — State legislature may impose, as a condition upon foreign corporations doing business within the state, that they shall assess and collect a tax upon that portion of their loans in the hands of individuals resident within the state; and continuing in business after the imposition of such condition will be taken as an assent thereto. *Id.*

19. IMPLIED CONDITION AGAINST. — There is an implied condition, both as to foreign and domestic corporations, that they will be subject to such reasonable regulations in respect to the general conduct of their affairs as the legislature may, from time to time, prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted. *Id.*

20. TAXATION OF — CONSTITUTIONAL LAW. — A foreign corporation which by private statute is allowed to do business within the state upon the payment of a stipulated sum annually may by subsequent statute be compelled to assess and collect a tax upon that portion of its loans held by residents within the state, without violating the contract between the state and the corporation. *Id.*

21. LIABILITY OF AGRICULTURAL SOCIETY FOR NEGLIGENCE CAUSING PERSONAL INJURY. — An agricultural society, organized under the statutes of Ohio, which constructs on its fair-grounds seats for the use of its patrons, is liable, in its corporate capacity, to an action for damages by a person who, while attending a fair held by it, and rightfully occupying one of its seats, sustains a personal injury by reason of the society's negligence in the construction of the seats. *Dunn* v. *Agricultural Soc.*, 556.

See LIBEL AND SLANDER, 8–12, 14, 15; AGENCY, 2; APPEAL AND ERROR, 1; BANKRUPTCY AND INSOLVENCY, 1; CONFLICT OF LAWS, 1; CONTEMPT, 1, 2.

COSTS.

See TRIAL, 4.

CO-TENANCY.

1. RIGHT OF CO-TENANT TO COMPENSATION. — A co-tenant is not entitled to compensation for his services in managing or taking care of the common property, except as the result of an express or clearly implied agreement to that effect between the parties. *Redfield* v. *Gleason*, 889.

2. RENTS AND PROFITS OF ESTATE IN COMMON, LIABILITY OF CO-TENANT TO ACCOUNT FOR. — Under the Ohio statute, the voluntary and profitable use, occupation, and enjoyment by a tenant in common of the common estate creates a liability against him to account, according to the justice and equity of the case, to the out-tenant, as for his share of the rents and profits received by the former. And if the occupying tenant uses

and enjoys the profitable possession of lands belonging to the common estate for the purpose of pasturing his cattle, it will be no defense to an action to account that he had sufficient pasturage of his own for his cattle, and did not need said land for that purpose. *West* v. *Weyer*, 552.

3. TENANT IN COMMON NOT LIABLE FOR INTEREST WHEN. — Where no demand is made upon the occupying tenant in common, either for possession of the common estate or for the value of the use thereof, before the commencement of an action against him by his co-tenant to recover for the use, he is not liable to account for interest upon the amount found due to his co-tenant for such use. *Id.*

4. ACCOUNTING BETWEEN TENANTS IN COMMON. — As between tenants in common of an opened and developed slate quarry, the compensation which the tenant out of possession is entitled to receive from the tenant in possession taking out slate is to be measured by the market value of the slate in place, or in a state of nature; this being the value of the royalty or slate-leave which can be obtained for the privilege of removing and manufacturing the slate under the circumstances of the case. *Appeal of Fulmer*, 662.

COUNTIES.

1. ACT SUBMITTING TO VOTE OF PEOPLE QUESTION OF CREATION OF NEW COUNTY IS CONSTITUTIONAL. — An act which provides for the formation of a new county out of a part of another county, upon the assent of two thirds of the qualified electors of the proposed new county voting at an election to be held for that purpose at a time fixed in the act, is constitutional, and is not a delegation of legislative authority. *People ex rel.* v. *McFadden*, 66.

2. LEGISLATURE HAS POWER TO PASS CONDITIONAL STATUTE, and to make its taking effect depend upon some subsequent event, and it may also provide within what time an act must be done, if done at all. Making certain provisions of an act to depend upon the vote of the people of a county does not delegate to the people the power to pass or repeal the act, which is a valid statute from the time of its passage and approval, and where the legislature itself provides that if the provisions of the act be not accepted within the period named therein, they shall not be thereafter carried into effect. *Id.*

3. COUNTY IS NOT CORPORATION FOR MUNICIPAL PURPOSES within the meaning of section 6 of article 11 of the constitution of California, which provides that corporations for municipal purposes shall not be created by special laws. Counties, so far as they are to be regarded as corporations at all, are political corporations. *Id.*

4. WHETHER GENERAL LAW CAN BE MADE APPLICABLE IS QUESTION OF FACT. — Whether or not a general law can be made applicable depends upon questions of fact, of which the legislature is the exclusive judge. The policy of creating a new county is one to be determined by the legislature in each instance when the proposition to do so is made, and if the determination be favorable, then the legislature alone must fix and determine the boundaries of such new county. *Id.*

5. POWER OF LEGISLATURE TO ORGANIZE NEW COUNTY BY SPECIAL ACT. — The legislature has power to organize a new county by special act, and may make all special provisions that are incident to its complete organization, and that do not extend in their operation beyond the time when the organization shall become complete and subject to the operation of

general laws; and it may classify every new county as it is organized, according to the best information at its command, until such time as it can fall into the line of classification prescribed by the general law. Whether special provisions which do not affect the validity of the whole act are constitutional or not will not be considered when the question under consideration relates only to the validity of the act as a whole. *Id.*

6. CONSTITUTIONALITY OF ACT FOR ORGANIZATION OF ORANGE COUNTY. — The act for the organization of the county of Orange is not, as a whole, or in any matter that affects its general scope and purpose, in conflict with the constitution. *Id.*

COVENANTS.

1. COVENANT OF WARRANTY, PUBLIC EASEMENT WHEN NOT A BREACH OF. — The fact that part of the land conveyed with a covenant of warranty was, at the time of the conveyance, a highway, and used as such, is not a breach of such covenant, because the grantee is presumed to have known of the existence of the public easement, and to have purchased upon a consideration in reference to the situation in that respect. *Hymes* v. *Estey*, 421.

2. COVENANT OF WARRANTY, PUBLIC EASEMENT WHEN A BREACH OF. — The existence of a public easement, such as a right of way for a public street, when the grantee has no notice of the right to such easement, and there was no indication of a highway or street on the property at the time of his purchase, is a breach of a covenant of warranty. *Id.*

CREDITORS' BILLS.

CREDITOR'S BILL, WHAT SUBJECT TO. — WIDOW'S RIGHT TO HAVE DOWER ASSIGNED TO HER may be subjected to the payment of her debts by a proceeding in equity, by which a receiver may be appointed with authority to proceed in her name to have such dower assigned to her, and to receive the rents and profits thereof. *McMahon* v. *Gray*, 202.

CRIMINAL LAW.

1. JOINDER OF SEVERAL DISTINCT MISDEMEANORS IN THE SAME INDICTMENT is not a cause for the reversal of the judgment, where there is a general verdict, and the sentence is single, and is appropriate to either of the counts upon which the conviction was had. *People* v. *Budd*, 460.

2. JURY AND JURORS — RIGHT OF TRIAL BY JURY. — In prosecutions for felony, where a plea of not guilty is entered, the right to a jury trial cannot be waived, so as to confer jurisdiction to try, convict, and sentence defendant without the intervention of a jury, under constitutional and statutory provisions guaranteeing and declaring inviolable the right of trial by jury as provided for at common law. *Harris* v. *People*, 153.

3. JURY AND JURORS — RIGHT OF TRIAL BY JURY — FUNCTIONS OF COURT AND JURY. — A jury being the only legally constituted tribunal for the trial of an indictment for felony, the court is not such tribunal, and in the absence of the jury the judge has no jurisdiction to sit as a substitute for it, and perform its functions, and if he attempts to do so his acts are void. *Id.*

4. JURY AND JURORS. — RIGHT OF TRIAL BY JURY MAY BE WAIVED by a plea of guilty, but such waiver cannot confer jurisdiction upon a tribunal which has no such jurisdiction by law. *Id.*

5. CONVICTION OF ASSAULT AND BATTERY amounts to an acquittal of a charge of assault to do great bodily harm. *People* v. *Pearl*, 304.

6. FELONIOUS ASSAULT — EVIDENCE. — On the trial of a charge of felonious assault, evidence of the particulars of a previous affray with another, at which defendant was not present, and not forming part of the affray with which he is charged, is inadmissible. *Id.*

7. ASSAULT WITH A DEADLY WEAPON cannot be justified when the party assaulted is not near or threatening the party committing the assault. *Id.*

8. SELF-DEFENSE. — Doctrine that homicide is not justifiable, except in cases of necessity, may have some application in other cases of willful and felonious injury. *Id.*

9. SELF-DEFENSE. — A violent attack is a sufficient excuse for going beyond the mere necessities of self-defense, and chastising the aggressor within bounds not exceeding the provocation. *Id.*

10. SELF-DEFENSE. — The provoker of an attack runs the risks of suffering to the extent of the natural limits of the provocation offered, although the punishment inflicted extends beyond the necessities of mere self-defense. *Id.*

11. IN CASES OF SELF-DEFENSE, the jury cannot determine the standard of courage, or whether the party attacked, in what he did in his defense, acted cowardly, and therefore without warrant. There is no question of courage or cowardice in such cases. *People* v. *Lennon*, 259.

12. IN CASES OF SELF-DEFENSE THE QUESTION TO BE DETERMINED IS, Did the accused, under the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or of great bodily harm, and that it was necessary to do what he did, in order to protect himself? If so, he is excused, and it can make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted therewith, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm. *Id.*

13. IN CASES OF SELF-DEFENSE, the physical and mental make-up of the accused, and his experience in danger, are to be considered as bearing upon the honesty of his alleged belief of personal danger, upon which he bases his right to act; but in such consideration, the fact that he is weak, timid, and cowardly by nature is to be weighed in his favor, and not against him. *Id.*

14. RAPE — EVIDENCE OF PARTICULAR UNCHASTE ACTS. — In prosecutions for rape, the general character of the prosecutrix for chastity may be impeached, but specific acts of sexual intercourse by her with third persons cannot be shown, and when she denies the commission of such acts on cross-examination, her answer is conclusive. *People* v. *McLean*, 263.

15. SUICIDE WAS A CRIME at the common law, but it is not a crime by the laws of the state of New York, though an attempt to commit it is. *Darrow* v. *Family etc. Soc.*, 430.

DAMAGES.

EXEMPLARY DAMAGES ARE NOT RECOVERABLE AS MATTER OF RIGHT, but are given to stamp the condemnation of the jury upon the acts of defendant because of their malicious or oppressive character. *Goldsmith* v. *Joy*, 923.

See ASSAULT; CARRIERS, 18; CONTRACTS, 4; CORPORATIONS, 4, 9; LIBEL AND SLANDER, 9, 23.

DECREES.

See JUDGMENTS.

DEDICATION.

1. ARGUMENTATIVE FINDING OF DEDICATION OF STREET WILL NOT SUPPORT JUDGMENT WHEN. — Where the court finds generally in favor of the dedication of a street from the acts, facts, and matters before specifically found, and expressly and entirely as a conclusion therefrom, but the specific facts so found do not support such general conclusion, the judgment should be reversed. *People* v. *Reed*, 22.
2. MERE MARKING OF STREET ON UNRECORDED MAP DOES NOT CONSTITUTE DEDICATION WHEN. — The mere marking of a street on an unrecorded map of a town or city plat will not constitute a dedication of the street to the public by the owner, if the street is not actually opened, no sale of lots is made thereon, and the property remains inclosed and occupied by substantial and permanent buildings for more than twenty years before any action is taken by the municipal authorities to declare the street dedicated to the use of the public. *Id.*
3. MAKING AND FILING OF MAP DESIGNATING STREETS IS ONLY OFFER TO DEDICATE THEM. — The making and filing of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and the dedication does not become effectual and irrevocable until the same is accepted by the public, either by user or some formal act of acceptance. But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the public, but the filing of it; and where the right of the public to claim the street rests upon the map alone, there is no offer to be accepted until the map is filed for record. *Id.*
4. OWNER OF LAND MAY WITHDRAW OFFER OF DEDICATION THEREOF to the public as a street at any time before his offer is accepted. The mere making of sales of lots with reference to a map designating certain streets does not, therefore, constitute an irrevocable dedication to the public. As between him and the public, his act alone is not sufficient to constitute an irrevocable dedication. *Id.*
5. ACCEPTANCE OF OFFER OF DEDICATION OF STREET MUST BE MADE WITHIN REASONABLE TIME. — The acceptance of an offer of the dedication of a street must be made either by user or by some formal act of acceptance within a reasonable time. An acceptance made more than twenty years after the offer of dedication is too late. *Id.*

See ESTOPPEL.

DEEDS.

1. CONSTRUCTION — EVIDENCE TO VARY. — When the bank of a navigable stream is called for as a boundary in a deed, the law will presume the grantor's intention to have been to carry the line to low-water mark; and when the words of the deed are clear and consistent, and no fraud or mistake is alleged, the intention of the parties cannot be shown to override their obvious meaning. If, however, there is anything in the deed which indicates a different intent, the question is one of construction for the court; or if there are extraneous facts or circumstances which, if proved, would bear upon the proper construction, that question may, under proper instructions, become one for the jury. *Palmer* v. *Farrell*, 708.

2. CONSTRUCTION — PAROL EVIDENCE TO VARY. — Where a deed calls for land "bounded and described according to" a certain survey, and does not call for a river as a boundary, but does call for certain lines run between certain points designated by the surveyor as on the bank of a river, and which exclude the land in dispute, parol evidence is admissible to show that the river bank referred to is artificial; that the grantee had notice before the sale that the grantor reserved the land in dispute, and refused to execute a deed expressly conveying it; that the sale was expressly subject to a survey which was afterwards made; and that the lines in the deed were in exact accordance with such survey. *Id.*

3. WITNESS — COMPETENCY — EVIDENCE TO EXPLAIN DEED. — In a controversy as to whether or not certain lands were conveyed by deed, where the plaintiff claims under the grantors and the defendant under the grantee in such deed, one of the grantors who has conveyed her interest without covenant of title is competent to testify as to such matters as are admissible to explain the deed, although the other grantors are dead, and when she is not called against their interests, and such grantee is alive, and competent to testify as to the same matters. *Id.*

4. CONSTRUCTION. — Where the intention of the grantors clearly appears from the face of a deed, effect must be given thereto, however unusual the form of the deed, unless the repugnancy in its clauses is such as to render the deed utterly void. *Cravens* v. *White*, 803.

5. EXCEPTION — CONSTRUCTION. — Where it clearly appears to have been the intention of the parties to a deed to except part of the property embraced in the general description, from its operation effect will be given to such intent, unless the repugnancy is such as to render the exception void. *Id.*

6. QUITCLAIM — BONA FIDE PURCHASER. — One holding or claiming under or through a quitclaim deed cannot claim protection as a *bona fide* and innocent purchaser. *Garrett* v. *Christopher*, 850.

7. QUITCLAIM. — WHETHER DEED IS QUITCLAIM or not depends upon the intent of the parties making it appearing from the face of the instrument, and the use of the word "quitclaim" will not restrict the conveyance if other language employed in the instrument indicates an intention to convey the land itself. *Id.*

See CHARITABLE USES, 1; MARRIED WOMEN, 4–11.

DIVORCE.

See HUSBAND AND WIFE, 5–7; MARRIAGE AND DIVORCE.

DOWER.

1. CONTINGENT RIGHT OF DOWER IS PROPERTY HAVING SUBSTANTIAL AND ASCERTAINABLE VALUE. — The contingent right of a wife to dower in her husband's lands at his death has a positive and substantial value which can, during his life, be ascertained with reasonable certainty by reference to tables of mortality of recognized authority, aided by evidence as to the state of health and constitutional vigor of the wife and her husband. *Mandel* v. *McClave*, 627.

2. WIFE'S CONTINGENT RIGHT OF DOWER IN HER HUSBAND'S LANDS. EXTENT OF. — Where a wife joins with her husband in a mortgage of his lands to secure his debt, such release of her right of dower inures only to the benefit of the mortgagee and his privies, but does not inure to the

benefit of subsequent creditors of her husband; and if a judicial sale of the premises be made under judgments in their favor, she will be entitled to have the value of her contingent right of dower in the entire proceeds ascertained, and to have the same paid to her out of the balance left after payment of the mortgage debt, before any part of such balance can be applied to the payment of their judgments. *Id.*

DURESS.

1. PAYMENT BY A WIFE IS NOT VOLUNTARY WHEN COERCED BY A THREAT that otherwise her husband will be arrested and imprisoned, and she may therefore recover the amount she paid. *Adams* v. *Irving Nat. Bank*, 447.
2. DURESS PER MINAS — THREATS OF LAWFUL ARREST. — In relation to husband and wife, parent and child, each may avoid a contract induced and obtained by threats of the imprisonment of the other; and it is of no consequence whether the threat is of lawful or unlawful imprisonment. The principle which underlies all this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the conduct and interest of another, contracts thus made will be set aside. *Id.*

EASEMENTS.

EASEMENT, COMPELLING SUBMISSION TO. — AN OFFER TO PAY PLAINTIFF THE DAMAGES caused by the retention of a wall in its present site will not defeat his right to remove such wall if it is on his land. One cannot be compelled to sell his land, nor to grant an easement therein. *Hodgkins* v. *Farrington*, 168.

See COVENANTS, 1, 2.

ELEVATORS OF GRAIN.

See CONSTITUTIONAL LAW.

EMINENT DOMAIN.

See RAILROAD COMPANIES, 15.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

EQUITY.

1. EQUITABLE RELIEF WILL NOT ALWAYS BE GRANTED as a matter of course when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative value of the property affected, and other considerations which may present themselves under various circumstances, ought to be weighed, and relief afforded or withheld, as equity and good conscience require. *Turner* v. *Hart*, 243.
2. LACHES. — ONE HAVING THE PRIVILEGE OF RETURNING PROPERTY TO A PERSON OF WHOM HE PURCHASED IT, and of thereupon receiving back the purchase price, is not guilty of laches in delaying its return when he was advised by such person not to make such return, and that the property was good and would ultimately advance in the market. *Johnston* v. *Trask*, 394.

3. PARTY PRAYING FOR CANCELLATION of a conveyance must tender the money received thereon. *Cates* v. *Sparkman*, 806.

See HUSBAND AND WIFE, 2, 3.

EQUITABLE CONVERSION.

See WILLS, 4–8.

ESTOPPEL.

RIGHT OF PRIVATE INDIVIDUAL TO COMPEL OPENING OF STREET SHOWN ON MAP. — The right of private individuals, who have purchased property on the faith of a map designating streets therein, to compel the opening of the streets, depends solely upon the ground of estoppel, resting upon the representations whereby they have been induced to purchase on the faith of the implied statement that the designated streets were to be and remain open for public use. Purchasers who show that they acted on such representations may compel the opening of the streets, but if they do not, the public have no ground of complaint, where no offer of dedication has been made by the owner. *People* v. *Reed*, 22.

See CORPORATIONS, 8; JUDGMENTS, 1–5; RAILROAD COMPANIES, 14, 19.

EVIDENCE.

1. JURY AND JURIES — RIGHT TO VIEW PREMISES. — Testimony of localities can generally be better understood by views and observation than by word of mouth, and changes can just as well be explained after such view; therefore, the jury are generally entitled to view premises, where an injury is received, or to use photographs thereof produced in evidence. *Redell* v. *Berkey*, 370.
2. JUDICIAL NOTICE WILL NOT BE TAKEN OF THE STATUTES OF ANOTHER STATE. Its common law will be presumed to be the same as that of this state; and whether a contract made in another state is void by its laws will be determined according to the common law of this state, in the absence of evidence that a different law prevails in the former state. *Harvey* v. *Merrill*, 159.
3. DECLARATIONS AS RES GESTÆ. — Declarations of a boy as to how he received an injury, given in response to the question of "what was the matter," after he had been injured by a street-car, and had got up and walked to the sidewalk and sat down, are inadmissible as part of the *res gestæ*. *Chicago etc. R'y Co.* v. *Becker*, 144.
4. DECLARATIONS AS RES GESTÆ. — Declarations not made at the time of the accident, which do not explain nor characterize the manner in which the accident occurred, are not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as part of the principal transaction, are not admissible as part of the *res gestæ*. *Id.*
5. DECLARATIONS AS RES GESTÆ. — When the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, it is admissible as part of the *res gestæ;* but when it is merely a history, or part of a history, of a completed past affair, it is inadmissible. *Id.*
6. RES GESTÆ. — DECLARATION MADE BY AN INJURED PASSENGER immediately after the train passed, from which he jumped, and while he lay on

the platform where he fell, is admissible as part of the *res gestæ*. *Pennsylvania R. R. Co.* v. *Lyons*, 701.

See CONSTITUTIONAL LAW, 10, 12; CONTEMPT, 7; MASTER AND SERVANT, 24, 25, 27, 28.

EXECUTIONS.

1. WHAT SUBJECT TO. — WIDOW'S RIGHT TO HAVE DOWER ASSIGNED to her out of the lands of her deceased husband is not subject to an execution at law. *McMahon* v. *Gray*, 202.

2. VALIDITY OF LEVY. — A levy made in sight or within potential control of the goods is valid only when followed by possession within a reasonable time. *Dixon* v. *White Sewing Machine Co.*, 683.

3. LEVY OF, WHEN A TRESPASS. — The interest of an execution debtor in goods bailed or demised by him may be seized and sold, but a levy upon the goods in the possession of the bailee is such a disturbance of his possession as constitutes a trespass, whether the goods were actually taken or not. *Id.*

4. POSSESSION NECESSARY TO MAINTAIN TRESPASS FOR LEVY. — In order to maintain trespass for a levy on goods in the possession of a bailee, it is necessary that the plaintiff be in actual possession of the goods, or have the right of possession, at the time of the trespass, but after the sale of the goods the action may be maintained upon a reversionary or conditional right of possession. *Id.*

5. OFFICER'S RIGHT TO ALTER HIS LEVY AND RETURN. — An officer, after having levied upon goods, upon claim being made to them by a stranger, may either abandon the levy or restrict it to the defendant's interest, and he may alter his levy and return accordingly, provided the latter is appropriate in form and sufficient in law. *Id.*

6. OFFICER'S CONTROL OVER HIS RETURN lasts as long as the writ remains in his hands; but the effect of delaying the return until after the return day is to destroy the presumption to which it is ordinarily entitled in the officer's favor. *Id.*

7. EXEMPTIONS. — SALE OF EXEMPT PROPERTY is void, and those participating therein are trespassers. *Coville* v. *Bentley*, 312.

8. LIABILITY OF INDEMNIFIED OFFICER FOR FAILURE TO LEVY ON EXEMPT PROPERTY. — An officer, although indemnified, is not bound to levy, if in good faith he believes the property exempt, or that the levy would be illegal. *Id.*

9. LIABILITY OF OFFICER FOR FAILURE TO LEVY. — The defense that there was no property to be found liable to seizure belonging to the judgment debtor named in the execution is always open to the officer, whether indemnified or not, and is a good defense in an action for refusal to levy. *Id.*

10. EXEMPTIONS — WHO MAY CLAIM. — Where partners each claim the statu-exemption in a stock of goods, and it is shown that one of them is a carpenter, and works more or less at his trade as such, counsel have a right to go to the jury on the theory that his principal business is that of a carpenter, and that therefore he is not entitled to any exemption in the stock of goods. *Id.*

11. LIABILITY OF JUDGMENT CREDITOR FOR ACTS OF OFFICER IN SELLING EXEMPT PROPERTY. — Where an officer, without specific directions, and without requiring indemnity, attaches property, and, proceeding upon

his official responsibility, alone sells it under execution, though part of at the time of sale is claimed as exempt, the judgment creditor, being present and neither assenting or objecting, may bid at the sale, or take the money derived from it without indorsing the correctness of the officer's action, or making himself responsible therefor to him. *Russell* v. *Walker*, 239.

12. OFFICER'S RIGHT TO RECOVER OF PLAINTIFF WHEN COMPELLED TO PAY DAMAGES FOR UNAUTHORIZED ACTS. — The indemnity to which an officer is entitled, when there is any reasonable doubt as to the ownership of attached goods, may include damages, costs, and other legal expenses, including counsel fees, and if the officer neither demands indemnity nor asks specific directions, but assumes the responsibility of executing his process in his own way, he cannot require indemnity when, subsequently to his action, a controversy arises, even if he is successful in the controversy. *Id.*

13. AN ALIAS CAPIAS AD SATISFACIENDUM ought not to issue to reimprison a judgment debtor for the same cause for which he has been imprisoned under an original *capias ad satisfaciendum*, and from which imprisonment he has been duly discharged on *habeas corpus*, on the ground that it issued in a case not involving a tort. *People* v. *Healy*, 90.

See CREDITORS' BILLS; EXECUTIONS; REMAINDERS, 5.

EXECUTORS AND ADMINISTRATORS.

1. LETTERS OF ADMINISTRATION DO NOT BECOME VOID ON THE SUBSEQUENT DISCOVERY AND ADMISSION TO PROBATE OF A WILL. Until such letters are revoked, all persons acting in good faith are protected in dealing with the administrator. *Schluter* v. *Bowery Sav. Bank*, 494.

2. THE DIFFERENCE BETWEEN AN EXECUTOR AND A TRUSTEE IS, that the duties of the former pertain to the office, and those of the latter to the person. When a discretionary power of sale is given to an executor, or when, in the sense as applied to trusts, the duties imposed are active, the executors will be deemed trustees, and such powers cannot be executed by an administrator with a will annexed. *Greenland* v. *Waddell*, 400.

3. WHERE LANDS ARE DEVISED TO EXECUTORS WITH POWER OF SALE, THE RESIGNATION OF ONE OF THEM AS TRUSTEE, and the appointment of another as trustee in his place, does not relieve the former from execution of the trust which was devolved on him in virtue of his office of executor. While an executor remains in his relation as such, the court cannot appoint a trustee to supersede him in the exercise of his functions of executor. *Id.*

4. SUSPENSION OF POWERS OF ADMINISTRATOR DOES NOT SUSPEND RUNNING OF STATUTE. — The fact that the powers of an administrator whose duty it was to cause an order of sale to be issued were suspended for a part of the time cannot have the effect of suspending the running of the statute limiting the time within which such order can be issued. *Dorland* v. *Hanson*, 44.

5. LIABILITY OF SURETIES ON BOND OF EXECUTOR WHO HAS BEEN REMOVED. — An administrator appointed to fill the place of an executor who has been removed is entitled to receive from the latter his indebtedness to the estate on account of assets received by him, and converted to his own use, and may maintain an action upon the administration bond of the former executor and his sureties to recover the same. He is the suc-

cessor in the trust of his predecessor, and is clothed with all the rights of the estate he is appointed to administer. *Foster* v. *Wise*, 542.

6. LIABILITY OF SURETIES ON EXECUTOR'S BOND FOR ASSETS PREVIOUSLY CONVERTED BY HIM. — Where an executor, after having collected and converted to his own use all the assets of the estate, gives a new bond, the sureties thereon will be liable for all the assets so collected and converted by him. *Id.*

See BANKS AND BANKING, 2, 3.

EXEMPTIONS.

PARTNERSHIP PROPERTY. — All tools, apparatus, and books belonging to any trade or profession owned by persons not constituents of a family, and constituting partnership property, are exempt from attachment and execution against either of the partners, under article 2337 of the Revised Statutes of Texas. *St. Louis Type Foundry* v. *International etc. Co.*, 870.

See EXECUTIONS, 7–12.

FILING PAPERS.

See OFFICE AND OFFICERS, 6.

FIXTURES.

1. CHARACTER OF PROPERTY, AS REAL OR PERSONAL, may be fixed by contract with the owner of the real estate when the article is placed in position, but such contract cannot affect the rights of a mortgagee, or an innocent purchaser without notice. *Hopewell Mills* v. *Taunton Savings Bank*, 235.

2. CHARACTER OF PROPERTY, HOW DETERMINED. — Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications arising from the intention implied and manifested by the party so placing it, and which show whether or not it belongs to the building as an article designated to become part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted. *Id.*

3. WHAT ARE, ON MORTGAGED PROPERTY. — Whatever is placed in a building subject to a mortgage, by a mortgagor, or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, become part of the realty. *Id.*

4. ON MORTGAGED PROPERTY, WHAT ARE. — Heavy machinery, procured for use in manufacturing cotton cloth, and placed in a mortgaged cotton-mill, with much to indicate that, while there were changes in the kind of goods manufactured, the machinery was not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until worn out, or until, from some unforeseen cause, the real estate should be changed, and put to a different use, and attached to the building by being fastened to the floor, and connected with the motive power, with a view to permanence, becomes a fixture, and trover will not lie for its conversion. *Id.*

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

See LANDLORD AND TENANT, 6.

FRAUD.

1. IN ACTION FOR FRAUD AND DECEIT, PLAINTIFF MUST ALLEGE the facts constituting the fraud; and where false representations are relied upon, it is essential that they relate to some material existing fact, and not to the future intention of defendant, which he may or may not perform. *People* v. *Healey*, 90.

2. PURCHASER ON CREDIT. — Representations of a purchaser of goods on credit, that he will pay the value of the goods, is simply a promise to pay at the expiration of the credit, and his subsequent inability to discharge his obligation will not render him liable to an action for fraud and deceit. The remedy is in *assumpsit* for the price and value of the goods. *Id.*

3. GROUND OF LIABILITY IN ACTIONS OF FRAUD AND DECEIT, that renders defendant amenable to an action in tort, rests upon the affirmation of some existing fact which the party making it knows, or has good reason to know, to be false. *Id.*

4. FALSE REPRESENTATIONS. — A PROMISE TO PERFORM an act, though accompanied at the time with an intention not to perform, is not such a representation as is ground for an action at law. The party must sue upon the promise. *Id.*

5. ACTION OF FRAUD AND DECEIT AGAINST A PURCHASER OF GOODS ON CREDIT cannot be maintained simply on the allegation of the fact that the purchaser knew himself to be insolvent, and had no reasonable expectation of paying for the goods purchased. *Id.*

6. PURCHASE OF GOODS BY ONE WHO AT THE TIME INTENDS NOT TO PAY for them is such a fraud as will enable the seller to rescind the sale, although there were no false representations or pretenses. *Id.*

7. TO HOLD A PURCHASER OF GOODS ON CREDIT liable in an actionfor fraud and deceit, he must have been guilty of making some past or present false representation of fact, or of practicing some artifice or deception. *Id.*

See AGENCY, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS, 2–7; CORPORATIONS, 6, 8, 9, 14; INSURANCE, 5–7; LIMITATIONS, 2, 3; NEGOTIABLE INSTRUMENTS, 9.

FRAUDULENT CONVEYANCES.

1. SUFFICIENCY OF DELIVERY OF POSSESSION. — Where the purchaser of a farm at judicial sale takes possession, and afterwards purchases the personalty thereon from his vendor, and leases it to the vendor's wife, who, with her husband, and without removing the property, remains on the farm, the husband being hired as a laborer by the vendee, it cannot be ruled, as matter of law, that the delivery of possession of the personalty is insufficient as against the vendor's creditors; but that question, as well as the good faith of the transaction, is one for the jury. *Renninger* v. *Spatz*, 692.

2. SUFFICIENCY OF DELIVERY OF POSSESSION. — A sale of personalty is not good as against the creditors of the vendor, unless possession is delivered in accordance with the sale; but in determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, position of the parties, and intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required. *Id.*

3. FRAUDULENT PURCHASER. — Where a debtor, with intent to defraud his creditors, sells his property to a purchaser with knowledge of such intent, the sale is void, and the title of the purchaser worthless as against the creditors of the vendor, though he may have paid full value. *Id.*

4. PAROL EVIDENCE IS ADMISSIBLE TO SHOW that a conveyance absolute upon its face was made upon trusts, or that it was made to hinder, delay, or defraud creditors. The rule is here applied where an attaching creditor attacks an absolute transfer by an insolvent attachment defendant for fraud. *Harris* v. *Daugherty*, 812.

GIFTS.

1. TO CONSTITUTE A VALID GIFT, there must be, on the part of the donor, an intent to give and a delivery of the thing given to or for the donee in pursuance of such intent, and, on the part of the donee, acceptance. The delivery may be symbolical or actual. In the case of bonds and choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if this is the intention; and where the debt is that of the donee, the delivery may be accomplished by a receipt acknowledging payment. *Beaver* v. *Beaver*, 531.

2. THE ACCEPTANCE OF A GIFT MAY BE IMPLIED where the gift is otherwise complete, and is beneficial to the donee. *Id.*

3. FROM A FATHER TO HIS SON WILL NOT BE IMPLIED FROM THE DEPOSIT IN BANK of moneys by the father in the name of the latter, of which the son never had any knowledge, if the father did not at the time of the deposit make any declaration of his intention, and he then received a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, were made evidence of the right to draw the deposit, and such rules further declared that no person had any right to payment of any part of the principal or interest without presenting the pass-book. *Id.*

4. GIFT BY HUSBAND TO WIFE, CHANGE OF POSSESSION TO SUSTAIN. — When a husband in solvent circumstances gives his wife personal property, which is at once delivered to her, and the husband never resumes possession thereof as owner, but declares it to be hers, and simply continues to use it as he had hitherto done, and the wife takes possession of the property, and openly claims to be the owner of it, using it as a wife ordinarily does, and being acknowledged by all others who use it as its owner, the transfer of the property is not invalid as against the subsequent creditors of the husband, on the ground that it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession. *Morgan* v. *Ball*, 34.

5. MERE USE BY HUSBAND OF PROPERTY GIVEN BY HIM TO HIS WIFE when he is solvent, which is the same after as before the making of the gift, will not render the gift void as to debts contracted by him while so using it, if delivery of possession was immediately made to the wife, and the possession has been continuous, and such as is usual when a gift of this sort is made by a husband to a wife, and his declarations and the acts of others who use the property are made and done in open acknowledgment of her ownership of and control over it, as distinct and changed from her husband to her. *Id.*

GUARANTY.

GUARANTY, TERMINATION OF, BY DEATH. — If a mortgage is given to secure such indebtedness as may afterwards accrue from the sale of goods by the mortgagee to a third person, this amounts to a guaranty by the mortgagor, and is terminated by his death. For such goods as are sold after the mortgagor's death, the mortgage does not operate as a security. *Hyland* v. *Habich*, 174.

HARMLESS ERROR.

See APPEAL AND ERROR, 7, 8.

HOMESTEAD.

HOMESTEAD, DEED OF, BY HUSBAND ALONE IS VOID, AND ACQUIRES NO VALIDITY FROM SUBSEQUENT ABANDONMENT OF THE HOMESTEAD. — A deed of property upon which there is a subsisting homestead, which is executed by the husband alone, whether absolute or intended as a mortgage, is void, and can acquire no validity by an abandonment of the homestead subsequently made by both husband and wife. The abandonment of the homestead has no retroactive operation. *Gleason* v. *Spray*, 47.

HUSBAND AND WIFE.

1. CANNOT CONTRACT WITH EACH OTHER by the common law nor under the statute of New York. *Hendricks* v. *Isaacs*, 524.

2. IF HUSBAND AND WIFE CONTRACT WITH EACH OTHER AS IF UNMARRIED, A COURT OF EQUITY INQUIRES whether the contract was fair and just, and equitably ought to be enforced, and administers relief where both the contract and circumstances require it. *Id.*

3. COURTS OF EQUITY DO NOT ENTERTAIN JURISDICTION TO ENFORCE MERE VOLUNTARY AGREEMENTS not founded upon any valuable consideration, either in favor of the wife against the husband, or in his favor against the wife; but if they are fair and just, and have been consummated, a court of equity will uphold the transaction, except as against creditors. *Id.*

4. CONTRACT BY A WIFE TO REPAY MONEYS WHICH THE HUSBAND ADVANCES TO DEFRAY the expenses of herself and their children will be enforced in equity, if the husband had already paid her a gross sum for expenses to be applied in her discretion, and she was also in receipt of an income from a bequest made by her husband's father, which the latter directed her to apply to the maintenance of herself and her issue. But her agreement to repay her husband will not be enforced against her administrator, if it is shown that in her lifetime she expended, in the support of herself and their children, the entire income which she had received under the will, and that the debts owing by her exceeded the amount collected by her administrator for arrears of income due her under her will at the time of her death. *Id.*

5. CONTRACTS FOR THE FUTURE SEPARATION OF HUSBAND AND WIFE are void. *Galusha* v. *Galusha*, 453.

6. CONTRACT BETWEEN HUSBAND AND WIFE AFTER THEIR SEPARATION, through the intervention of a trustee, is effective to bind the husband to contribute the sum therein provided for her support, and it is also binding on the wife and the trustee, that she will accept the payment

therein designated in full satisfaction of her maintenance and support. *Id.*

7. THE DIVORCE OF A HUSBAND AND WIFE AFTER THEY HAVE ENTERED INTO A VALID AGREEMENT OF SEPARATION, or the commission by either of them of an act entitling the other to a divorce, does not avoid or annul such agreement, or entitle either to be released therefrom; and the court granting a decree errs if it disregards the agreement, and makes provision for the wife inconsistent therewith. *Id.*

8. AGENCY — CONVEYANCE BY HUSBAND AS AGENT TO WIFE. — Though the Illinois statute empowers the wife to contract with her husband, and to hold a separate estate during coverture, still it has not denied to each all interest in the property of the other; the husband still has a pecuniary and relational interest in his wife's estate, and is prohibited from conveying property to her, for which he is the agent to sell, without the full knowledge and express consent of his principal. *Tyler* v. *Sanborn*, 97.

See AGENCY, 5; DOWER; DURESS; GIFTS, 4, 5; HOMESTEAD; MARRIED WOMEN.

IMPROVEMENTS.

See PUBLIC LANDS, 2.

INFANTS AND INFANCY.

1. CONTRACT OF INFANT — REPRESENTATION AS TO AGE. — An action in tort will not lie against an infant for fraudulently representing himself to be of full age, thereby obtaining credit, and inducing plaintiff to contract with him. *Nash* v. *Jewett*, 931.

2. FORM OF ACTION does not determine the liability of an infant, and he cannot be made liable when the cause of action arises from contract in an action in form *ex delicto*. *Id.*

3. MINOR MAY AVOID HIS CONTRACT WITHOUT PUTTING THE OTHER PARTY IN STATU QUO or returning the consideration received, if the contract was not for necessaries, nor necessarily beneficial to the minor. *Dube* v. *Beaudry*, 228.

4. MINOR CONTRACTING TO WORK FOR ANOTHER, AND THAT PART OF HIS WAGES SHOULD BE APPLIED TO THE PAYMENT OF A DEBT DUE FROM HIS FATHER'S ESTATE, may, by disaffirming the contract, and suing upon a *quantum meruit*, recover the full value of services rendered by him, where it does not appear that he can receive any benefit from his father's estate. *Id.*

5. NEGLIGENCE OF MINOR — PRESUMPTION. — A boy thirteen years and four months old has not attained an age when sufficient capacity to be sensible of danger and to avoid it is presumed. *Strawbridge* v. *Bradford*, 670.

6. ORDINARY CARE, AS APPLIED TO INFANTS, WHAT IS. — In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct is not to be judged by the same rule that governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and pru-

dence, are accustomed to exercise under similar circumstances. *Rolling Mill Co.* v. *Corrigan*, 596.

See MASTER AND SERVANT, 13–17.

INJUNCTIONS.

1. NUISANCE — JOINDER OF PARTIES. — The unlawful maintenance of a dam practically destroying three hundred acres of agricultural land, and which is a continuing nuisance as to the several complainants, may be enjoined and abated in a suit in which they all join in petition for relief. *Turner* v. *Hart*, 243.
2. JOINDER OF PARTIES. — INJUNCTIVE RELIEF MAY BE GRANTED against the unlawful maintenance of a dam, though the complainants in the suit are differently affected, at least in degree, by the act complained of. This is more especially true when objection is not made by special demurrer, and the parties proceed to a hearing. *Id.*

INSANE PERSONS.

1. CONTRACTS WITH A LUNATIC, HABITUAL DRUNKARD, OR PERSON OF UNSOUND MIND, MADE AFTER INQUISITION and confirmation thereof, are absolutely void, until by permission of the court he is allowed to assume the control of his property. *Hughes* v. *Jones*, 386.
2. CONTRACTS WITH LUNATICS AND OTHER PERSONS OF UNSOUND MIND MADE BEFORE OFFICE FOUND, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence. *Id.*
3. PROCEEDINGS IN LUNACY ARE PRESUMPTIVE, BUT NOT CONCLUSIVE, EVIDENCE of want of capacity. *Id.*
4. AN INQUISITION WAS AN INQUIRY MADE BY A JURY BEFORE A SHERIFF, coroner, escheator, or other government officer, or by commissioners especially appointed, concerning any matter that entitled the sovereign to the possession of lands or tenements, goods or chattels, by reason of escheat, forfeiture, idiocy, or the like. It was a proceeding in behalf of the public represented by the king. *Id.*
5. AN INQUISITION OF LUNACY BINDS THE WHOLE WORLD. *Id.*
6. PETITIONER FOR AN INQUISITION OF LUNACY IS NOT A PARTY THERETO IN ANY DIFFERENT SENSE THAN ANY OTHER PERSON, and is not personally estopped by the findings of the jury, except as all the world is estopped. He may, therefore, show that a deed made by the alleged lunatic at any time prior to the filing of the petition was made by him while he was of sound mind. *Id.*
7. AN INQUISITION OF LUNACY CANNOT DETERMINE ANYTHING, EXCEPT THE STATUS OF THE ALLEGED LUNATIC. It cannot settle any question of property, and the finding by the jury that a lunatic had, at the time, title to certain lands, is of no force whatever as against one claiming under a prior deed. *Id.*

See PARTNERSHIP, 2–6.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See TRIAL, 1–3.

INSURANCE.

1. INSURED MUST BE HELD TO KNOWLEDGE OF THE CONDITIONS of his contract of insurance. The fact that he has never seen his policy, nor read it, cannot help him, when no adequate reason is shown why he could not have seen it, had he desired to do so. *Cleaver* v. *Traders' Ins. Co.*, 275.

2. INSURANCE ON MORTGAGED PROPERTY — EFFECT OF FORECLOSURE. — Where insurance is taken on mortgaged property with knowledge that the mortgage is overdue, and through an accidental omission on the part of the agent the insurance is not made payable to the mortgagee, the insured being ignorant of the English language, and relying upon the agent, the mere commencement of foreclosure proceedings will not avoid the policy, notwithstanding it provides that it shall become void if any proceedings are taken to foreclose a lien upon the property. *Butz* v. *Ohio Farmers' Ins. Co.*, 316.

3. WHAT CONSTITUTES AGENT. — A party who subscribes his name to an application for insurance as agent of the company, makes a statement of the exposures, and approves the risk as agent, and after this is brought to the notice of the company, receives and delivers the policy, lifts the premium, and reports it, and then collects assessments, and gives receipts recognized by the company, is its agent in effecting the insurance. *Kister* v. *Lebanon Mutual Ins. Co.*, 696.

4. CONDITION THAT PERSON PROCURING INSURANCE BE DEEMED AGENT OF ASSURED. — A condition in a policy of insurance that "if any broker, or other person than the assured, shall have procured this insurance to be taken by the company, such broker or other person shall be considered the agent of the assured, and not of this company," has reference to parties operating on their own account, or on behalf of the assured, and not to agents representing the company in procuring insurance. *Id.*

5. FRAUD OF AGENT or mistake on his part, within the scope of the powers given him by the insurance company, will not enable the latter to avoid a policy to the injury of the assured, who innocently became a party to the contract. *Id.*

6. FRAUD OF AGENT DOES NOT AFFECT INSURED. — Where an insurance agent has fraudulently cheated the insured into signing a false warranty and paying the premium, and the policy was issued upon the false statements of the agent, the false warranty thus procured will not avoid the policy, nor is the assured estopped from proving the fraud, and holding the company to the contract. *Id.*

7. COMPANY CANNOT REPUDIATE THE FRAUD OF ITS AGENT, and thus escape liability on a policy consummated thereby, simply because the insured accepted in good faith the false representations of the agent without examination. *Id.*

8. INSURANCE. — CONDITION AGAINST INCREASE OF ENCUMBRANCES on the insured property without notice thereof to the company is not violated by a change, but not an increase, of encumbrances known to the company at the time the insurance was effected. *Id.*

9. FORFEITURE OF POLICY OF INSURANCE incurred by taking additional insurance contrary to the conditions of the policy is not saved by proof that the agent had authority in a certain manner to consent to the taking of additional insurance, and had done so in other cases, when it is not shown that he so consented in plaintiff's case, within the line of his

authority or in the manner prescribed in the policy, or that he was authorized to waive any of its conditions. *Cleaver* v. *Traders' Ins. Co.*, 275.

10. WAIVER OF FORFEITURE. — A forfeiture of a policy by taking additional insurance in violation of its conditions may be waived by the company, when, with knowledge of the forfeiture, and supposing it to be waived, it fails to notify the insured of its intention to insist on the forfeiture until after its adjuster has visited the insured, and obtained from him all the information asked for in relation to the extent and value of his loss. Such action by the company will warrant the jury in finding a waiver of the forfeiture, and that question should be submitted to it. *Id.*

11. WAIVER OF CONDITION. — A condition in an insurance policy requiring suit to be brought within six months after the loss may be waived, and such waiver need not be express, but may consist of the acts and conduct of the company and its officers which throw the insured off his guard, and lull him into security until the expiration of the time mentioned in the condition. *Bonnert* v. *Pennsylvania Ins. Co.*, 739.

12. DUTY OF COMPANY AS TO CONDITIONS IN ITS FAVOR. — When an insurance company attempts to defeat a recovery upon a policy upon a condition for its own benefit, and which deprives the assured, no matter how honest his claim, of the indemnity which he paid for, the company must be held to entire good faith, and the breach of condition must be promptly taken advantage of. Nothing else must be alleged as a reason for non-payment, and the insured must not be led astray by proposing settlement on grounds other than the alleged breach of condition. *Id.*

13. WAIVER OF CONDITION QUESTION FOR JURY. — A limitation or condition in a policy of insurance intended for the benefit of the company may be waived by it, and the fact of such waiver is a question for the jury. *Id.*

14. WAIVER OF CONDITION IN POLICY OF INSURANCE in favor of the company need not be express. It may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken, or even from denial of obligation exclusively for other reasons. *Id.*

15. LIFE INSURANCE. — CONSTRUCTION OF POLICY OF INSURANCE must always be in favor of upholding the contract, and no construction working a forfeiture will be given if any other is permissible from the language used. *Darrow* v. *Family etc. Soc.*, 430.

16. LIFE INSURANCE. — SUICIDE OF ONE WHOSE LIFE IS INSURED CONSTITUTES NO DEFENSE to an action on the policy of insurance, unless it comes within some condition of the contract of insurance relieving the insurer from liability in such a case. *Id.*

17. LIFE INSURANCE. — SUICIDE OF AN ASSURED DOES NOT RELIEVE FROM LIABILITY the company which has insured his life, and has issued a policy which provided that it was "to be void if the member herein shall die in consequence of a duel, or by the hands of justice, or of any violation of or attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be," when by the law of the state wherein the assured dies an attempt to commit suicide is not is not a crime if successful. *Id.*

18. MUTUAL ASSURANCE ASSOCIATION, REMEDY WHEN IT FAILS TO COLLECT ASSESSMENT FOR THE DEATH FUND. — If a mutual assurance association

issues a policy to one of its members whereby it agrees to pay, on his death, the amount therein named "from the death fund of the association at the time of such death," and if the contract further provides that whenever the death fund is insufficient to meet existing claims, "a call shall be made upon this entire class of membership in force," and the association, after due notice of death, neglects to make the call necessary to produce the death fund required, an action may be sustained against it for the amount of a policy without first resorting to proceedings in equity to compel the levying of a call or assessment. This latter is cumulative merely, and the association cannot successfully urge its own lack of duty in not making a call as a defense to an action brought upon its policy. *Id.*

JUDGMENTS.

1. NOTICE. — CLAIM CANNOT BE BARRED by a proceeding in which it was in no way involved, and of which the party to be estopped had no notice. *Raymond* v. *Vaughn*, 112.
2. JUDGMENT, HOWEVER ERRONEOUS, IS BINDING upon the parties until vacated and reversed, and when affirmed by the supreme court, is regarded as free from error. *Gould* v. *Sternberg*, 138.
3. RES JUDICATA. — A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them. It is *res judicata*, and cannot be collaterally attacked, even upon facts not brought out in the suit in which it was rendered. *Id.*
4. JUDGMENT OR DECREE BINDING UPON THE PARTIES as the facts existed when it was rendered is not rendered less binding because subsequent events have changed those facts. *Id.*
5. RES JUDICATA. — A finding that a piece of land had been dedicated, accepted, used, and occupied as a public street more than twenty years before the commencement of the action, is not conclusive against the defendant in a subsequent action that, at the time he purchased such land, and within such twenty years, he had notice of the existence of such street, or that its use was so notorious that he must be deemed to have notice of it. *Hymes* v. *Estley*, 421.
6. JUDGMENT RENDERED UPON SERVICE BY PUBLICATION, embracing a recital of the evidence upon which it was based, and in a case where there were no unknown heirs, was sufficient under the law of Texas as it existed in January, 1879. *Harris* v. *Daugherty*, 812.
7. ORDER OF SALE UPON DECREE ENFORCING LIEN CANNOT ISSUE AFTER FIVE YEARS. — Section 681 of the Code of Civil Procedure, which limits the time within which an execution can issue to five years after the entry of the judgment, applies as well to a decree foreclosing the lien of a street assessment, and an order of sale thereunder, as to a personal judgment for the recovery of money and an execution thereon. Section 685, which allows a judgment to be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings, applies only to a judgment requiring the party against whom it is rendered to do some specific act. *Dorland* v. *Hanson*, 44.
8. EFFECT OF REVERSAL — SUBSEQUENT PURCHASER. — When a judgment foreclosing a mortgage, and directing the sale of certain lands named in the mortgage, and also of certain substituted lands not men-

tioned therein, is reversed as to the sale of the substituted lands, the effect of such reversal is to destroy the title to such lands acquired by the mortgagee at a sale made before such reversal, under process issued only to carry out the judgment of foreclosure. Therefore, a purchaser from the mortgagee subsequent to the reversal acquires no title to such lands. *Adams* v. *Odom*, 827.

9. EFFECT OF REVERSAL. — When property of a defendant has been sold under a judgment, afterwards reversed, to a party to the judgment, the defendant may recover it back, or if purchased by a third party, he may recover from plaintiff the value thereof; but the title is unaffected by the reversal. Only defendant or his privies can take advantage of the reversal, and this right may be waived, or if nothing is lost by the judgment, nothing can be gained by its reversal. *Gould* v. *Sternberg*, 138.

10. SALE ON EXECUTION UNDER JUDGMENT AFTERWARDS REVERSED is not void, but voidable only, at the election of the owner of the property sold; and if the property of a third person is sold, the judgment defendant can take no advantage of the reversal. *Id.*

11. EFFECT OF REVERSAL. — A judgment confirming title to land sold under execution is conclusive and binding on the parties and privies, though the judgment on which the execution was based is afterwards reversed. *Id.*

See MORTGAGES, 3.

JUDICIAL SALES.

See RAILROAD COMPANIES, 18, 19.

JURISDICTION.

See APPEAL AND ERROR, 4; ATTACHMENT, 3; RECEIVERS, 1–3.

JURY AND JURORS.

See CRIMINAL LAW, 2–4; EVIDENCE, 1.

LACHES.

See EQUITY; LICENSES, 3; NEGOTIABLE INSTRUMENTS, 6.

LANDLORD AND TENANT.

1. LANDLORD, WHO LIABLE AS. — One may be a landlord who is not an owner, and a landlord cannot escape from his obligation as such by showing that he is not an owner of the property. A verdict against one as a landlord of premises, the title to which is in his wife, is sustained by evidence that when applied to by plaintiff, and asked whether he had a tenement to let, he answered "yes," gave plaintiff the key, talked with him about repairs, and afterwards collected rent from him for several months, giving receipts therefor, generally in his own name. *Lindsey* v. *Leighton*, 199.

2. LANDLORD IS ANSWERABLE FOR DEFECTS IN THE PREMISES OF WHICH HE HAS NO ACTUAL KNOWLEDGE, and through which his tenants are injured. The landlord's duty is that of care, and his ignorance is no defense. *Id.*

3. RIGHTS OF SUBTENANT. — A tenant for a term certain, who has underlet a portion of the premises, has no right to surrender his lease to the preju-

dice of the under-tenant; and in such case the latter will be held to have attorned to the landlord under the conditions of his sublease. *Hessel* v. *Johnson*, 716.

4. RIGHTS OF SUBTENANT. — Where a tenant for a term certain has underlet a portion of the premises and surrendered his lease, the subtenant remaining in possession, his goods cannot be distrained for rent owing by a subsequent tenant, to whom the landlord has leased the whole premises after the surrender. *Id.*

5. AVOWRY FOR RENT IN ARREAR WILL NOT LIE until the tenant acquires possession, and the relation of landlord and tenant is shown to exist as to the premises upon which the seizure is made, if the goods distrained belong to a stranger. *Id.*

6. WRIT OF POSSESSION, WHAT CONSTITUTES EXECUTION OF, IN UNLAWFUL DETAINER. — In order to constitute a full execution of a writ of possession in an action of unlawful detainer, under the landlord and tenant act, the defendant and his property must be removed from the premises, and possession of the real estate given to the plaintiff, unless the removal of the personal property is in some way waived by the defendant. And if, before such removal is substantially completed, the judge directs a stay of proceedings upon appeal, and a bond is given in pursuance of the direction, the proceedings are stayed, and the defendant may remain in possession pending the appeal. *Lee Chuck* v. *Quan Wo Chong Co.*, 50.

LIBEL AND SLANDER.

1. PUBLICATION OF NEWSPAPER ITEM CONFESSEDLY UNTRUE IN SEVERAL PARTICULARS, all of which tended, in the connection used, to carry the impression that the parties named therein were guilty of felony, is clearly libelous *per se*, and the question for the jury is only one of damages. *McAllister* v. *Detroit Free Press Co.*, 318.

2. NO NEWSPAPER HAS ANY RIGHT to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and business, without answering for the libel in damages, and the greater the circulation of the paper the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. *Id.*

3. NEWSPAPER REPORTER HAS NO RIGHT to collect stories on the street, or gather information from policemen or magistrates out of court, about a citizen, to his detriment, and to publish them as facts in his newspaper. If true, such publication may be privileged; but if false, the newspaper is responsible to any one who is wronged thereby. *Id.*

4. FALSE PUBLICATION OF ARREST AND IMPRISONMENT. — A party cannot be subjected to the wrong and outrage of a false publication of his arrest and imprisonment, looking toward his guilt, without remedy; and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law so as to leave the injured party without redress and recompense for a wrong, which, under the law, can never be adequately compensated to one who values his reputation more than money. *Id.*

PRIVILEGED COMMUNICATIONS. — The truth is privileged when published from good motives and for justifiable ends, and that which is not true, but honestly believed to be true, and published in good faith by one in the performance of public or official duty, in certain cases, is also privileged. *Id.*

6. PRIVILEGED COMMUNICATIONS. — Communications made to a body or officer having power to redress a grievance complained of, or having cognizance of the subject-matter of the communications, to some intent or purpose, are privileged, and so in cases where the communication is made confidentially, or upon request, where the party requiring the information has an interest in knowing the character of the person inquired after. So a person may be justified when honestly endeavoring to vindicate his own interests, as in a case of slander of title, or guarding against any transaction which might operate to his own injury. *Id.*

7. LIBERTY OF THE PRESS, as the law now stands, is only a more extended and improved use of the liberty of speech prevailing before printing became general; and, independent of statute, the law recognizes no distinction in principle between a publication by a newspaper and a publication by any other person. A newspaper is not privileged, as such, in the dissemination of the news, but is liable for what it publishes in the same manner as any other individual. *Id.*

8. CORPORATION MAY BECOME CIVILLY RESPONSIBLE for libel in damages, actual or exemplary. *Missouri P. R'y Co.* v. *Richmond*, 794.

9. EXEMPLARY DAMAGES MAY BE AWARDED AGAINST CORPORATIONS, when it is shown that they have published a libel with express malice. *Id.*

10. ACTIONABLE LANGUAGE. — PUBLICATION BY CORPORATION about an employee that he was discharged for carelessness is susceptible of a libelous meaning. *Id.*

11. ACTIONABLE LANGUAGE CONCERNING PERSON IN HIS EMPLOYMENT. — Language which concerns a person in a lawful employment is actionable, if false and published with malice, and if it affects him in such employment in a manner that may, as a necessary consequence, or does, as a natural consequence, prevent him from deriving therefrom that pecuniary reward which, probably, otherwise he might have obtained. *Id.*

12. RAILROAD COMPANY HAS A RIGHT TO PRINT AND CIRCULATE to its officers and employees a discharge list, in order to guard against re-employing men who have proved themselves incompetent and untrustworthy, and an ex-employee, whose name appears thereon as discharged for carelessness, cannot maintain libel against the company in the absence of proof that such publication was known to be false and actuated by malice, and if false, but not published with malice, the company might be liable in libel to actual but not to exemplary damages. *Id.*

13. PRIVILEGED COMMUNICATIONS. — A communication made in good faith in reference to a matter in which the person communicating has an interest, or in which the public is interested, is privileged, if made to another for the purpose of protecting that interest; or if it is made in the discharge of a duty, and looking to the prevention of wrong toward another or the public, it is privileged if made in good faith; and in such case, even if the statement made is untrue, malice is not implied, but must be proved. *Id.*

14. PRIVILEGED COMMUNICATION. — Where a publication by a railway company of its discharged employees is placed in the hands of an agent of another railway company to enable it to avoid the employment of unsuitable persons, whether communicated by request or not, looking to the public interests involved, it is not an actionable publication so long as the communication is made in good faith, and believed to be true. *Id.*

15. PRIVILEGED COMMUNICATIONS. — A railway company having reason to believe that a discharged employee, seeking an important position in

the railway service, is incompetent, careless, or otherwise unfit, is under obligation to communicate its knowledge or belief to all who are likely to employ him in such service, and if such published communication is made in good faith, it is privileged. *Id.*

16. WHETHER OR NOT A PUBLICATION IS PRIVILEGED is a question of law for the court. *Cotulla* v. *Kerr*, 819.

17. PROVINCE OF COURT AND JURY. — In the absence of doubt or ambiguity in the language used, it is the duty of the court to determine and instruct the jury whether or not it is libelous; but when doubt or uncertainty exists, it is the duty of the court to define libel, and leave the jury to determine whether the offense has been proved. *Id.*

18. LIBEL OF PUBLIC OFFICER. — It is libelous *per se* to impute to a person in his official character incapacity, or any kind of fraud, dishonesty, or misconduct. *Id.*

19. LIBEL OF PUBLIC OFFICER. — To impute to an officer, in his official character, a want of integrity, and charge that he has been induced to act in his official capacity by a pecuniary or valuable consideration, is *prima facie* libelous. *Id.*

20. LIBEL OF PUBLIC OFFICER, affecting him personally, is governed by the same rules that apply to an individual; but if it affects him in his official character, and is of such nature that, if true, it would be cause for his removal from office, it is then actionable *per se*. A charge that a county commissioner, in the discharge of the duties of his office, was influenced by a pecuniary consideration, and willfully sat in judgment in matters in which he was personally pecuniarily interested, is libelous *per se*, and the court should so instruct the jury. *Id.*

21. CIRCULATING AND PRINTING, WHAT IS. — Every signer of a libelous paper knowing that it is intended to be printed, or who signs and delivers it to another without knowing that it would be printed, is guilty of circulating and publishing it before it is printed, and if he signs without protest or direction against its being printed, and it is afterwards printed by the person to whom it was delivered, or by his authority, it is no defense for the signer to say that he did not intend nor direct its publication. *Id.*

22. LIBEL OF PUBLIC OFFICER IN HIS OFFICIAL CHARACTER may be justified by proving it true, or by showing probable cause and reasonable grounds for believing it to be true. *Id.*

23. LIBEL OF PUBLIC OFFICER — MEASURE OF DAMAGES. — Libel of public officer in his official character, not justified by proof of its truth, makes each libeler liable for at least nominal damages, and for such further actual damages as are shown to be the proximate result of the publication, but not for remote or speculative damages, such as loss of financial credit, expense of borrowing money, or other things not connected with his official character, and also liable for exemplary damages if the publication was actuated by malice inferable from the absence of probable cause or from evidence of express malice. *Id.*

See CONTEMPT, 3, 4, 6.

LICENSES.

1. ORAL LICENSE TO DO ANY ACT ON THE LAND OF ANOTHER GIVES THE LICENSEE NO INTEREST in the land, and is revocable, not only at the will of the owner of the property on which it is to be exercised, but by

his death, or his alienation or demise of the land, and by whatever would deprive the original owner of the right to do the acts in question, or give permission to others to do them. *Hodgkins* v. *Farrington*, 168.

2. ORAL LICENSE GIVEN TO ONE WHO IS ERECTING A BUILDING to insert its timbers into a wall on the land of a person giving such license, though followed by the erection of the building and the insertion of the timbers, may be revoked by any one who subsequently becomes the owner of the land, by giving notice of such revocation, and requesting the then owner of the building to remove the timbers. The fact that the plaintiff will sustain no substantial injury if the wall remains as it is, and that the defendants will suffer heavy loss if it is removed, and they are compelled to take out their timbers, will not prevent the plaintiff from maintaining a bill in equity to compel their removal. *Id.*

3. LACHES IN NOT COMPELLING ONE TO REMOVE TIMBERS, which he inserted in a wall on the plaintiff's land by the oral license of plaintiff's predecessor in interest, will not prevent plaintiff from maintaining a bill in equity to compel such removal, if such timbers have not been kept in their present position a sufficient length of time to create a prescriptive right to have them continue undisturbed. *Id.*

LIENS.

See ATTACHMENT, 4.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

1. DUTY OF ATTORNEY TO PAY OVER MONEY COLLECTED FOR HIS CLIENT does not give rise to a continuing and subsisting trust, within the meaning of a statute excepting such trusts from the operation of the statute of limitations. *Douglas* v. *Corry*, 604.

2. STATUTE OF LIMITATIONS BEGINS TO RUN FROM TIME OF COLLECTION of money by an attorney for his client, which should have been paid over, where there has been no fraudulent concealment of the receipt of the money. *Id.*

3. PLAINTIFF RELYING ON MISREPRESENTATION OR CONCEALMENT TO TAKE CASE OUT OF OPERATION OF STATUTE OF LIMITATIONS must in his petition aver the facts constituting the fraud, and the time of its discovery; otherwise the petition will be open to demurrer, where it appears on the face of the petition that the action would otherwise be barred. *Id.*

4. NEW PROMISE. — An agreement by an indorser that a holder may sell, for less than its face value, a judgment against the maker for the full amount of a note, and a renewal of such agreement, with a waiver "of any statute plea thereon," is not such acknowledgment of indebtedness as will remove the bar of the statute of limitations. *Macrum* v. *Marshall*, 730.

5. NEW PROMISE. — An acknowledgment of indebtedness, to take a case out of the operation of the statute of limitations, must be clear and unambiguous, and must recognize and be directed to the debt with sufficient clearness to amount to an unqualified admission that it remains due and unpaid. *Id.*

See ADVERSE POSSESSION, 2; APPEAL AND ERROR, 2; EXECUTORS AND ADMINISTRATORS, 4; JUDGMENTS, 7; NEGOTIABLE INSTRUMENTS, 1, 2.

LIS PENDENS.

VENDOR AND VENDEE. — A purchaser of land, after institution of and during the pendency of suit by a third party to recover it, is charged with everything that injuriously affects his vendor's title. As a purchaser *pendente lite*, he can make no defense not open to his vendor. *Evans* v. *Welborn*, 858.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION OF CIVIL SUIT IS ACTIONABLE WHEN. — The prosecution, maliciously and without probable cause, of a suit in forcible entry and detainer, which results in a verdict for the defendant, affords ground for an action in the nature of a suit for malicious prosecution. *Pope* v. *Pollock*, 608.
2. PROBABLE CAUSE, WHEN A QUESTION FOR JURY. — When, in an action of malicious prosecution, the facts are in controversy, the question of probable cause must go to the jury, after the court has properly defined it, and given such instructions as will enable the jurors to draw correct conclusions from the facts as they find them. *Gulf etc. R'y Co.* v. *James*, 743.
3. PROBABLE CAUSE — MALICE — VERDICT. — When, in an action for malicious prosecution, the jury find both want of probable cause and malice, and return actual damages, when they might have assessed exemplary damages, this is no ground for setting aside the verdict, for the reason that such finding indicated that there was no malice. *Id.*
4. PRINCIPAL AND AGENT. — THE GENERAL MANAGER OF A RAILROAD who has the entire control and management of the business interests of the company may have the right to institute a prosecution for perjury on behalf of the company, and with this right goes a corresponding liability on the part of the company to answer in damages if the right is exercised without probable cause. *Id.*
5. PROBABLE CAUSE is not conclusively established by proof that defendant acted under the advice of counsel. This is only a circumstance showing want of malice, and supporting the defense of probable cause. *Id.*

MARRIAGE AND DIVORCE.

1. DEFAULT, RELIEF AGAINST, IN ACTION FOR ANNULMENT OF MARRIAGE. — In actions for divorce or for annulment of marriage, courts should afford to the parties the fullest possible hearing, and should be more liberal in relieving against defaults than in other actions. *Wadsworth* v. *Wadsworth*, 38.
2. CROSS-COMPLAINT IN ACTION OF DIVORCE OR FOR ANNULMENT OF MARRIAGE. — There may be a cross-complaint in an action for divorce or for annulment of marriage. *Id.*

MARRIED WOMEN.

1. SEPARATE PROPERTY — LIABILITY FOR HUSBAND'S DEBTS — INNOCENT PURCHASER. — When a deed in the wife's name fails to show that money paid for land belonged to her separate estate, or that it was intended to make the land her separate property, the land is liable to be seized and sold by her husband's creditors so as to vest title in a purchaser who pays a valuable consideration without notice of her equities before the purchase. The payment of five dollars by a creditor at a sale under

his own judgment will not entitle him to protection as an innocent purchaser for value. *Evans* v. *Welborn*, 858.

2. SEPARATE PROPERTY — RESULTING TRUST. — Where land is paid for with the separate money of the wife, and the deed is taken in her name, a resulting trust is created in her favor which cannot be defeated by levy of attachment against her husband, or any proceeding short of a sale of the land to an innocent purchaser for value. *Id.*

3. WIFE'S SEPARATE PROPERTY IN FACT is not liable for her husband's debts, and therefore no kind of conveyance or disposition of it can have the effect to defraud his creditors. *Id.*

4. WIFE'S SEPARATE PROPERTY may be conveyed by herself and husband in trust, to be held and disposed of for her benefit, and if the property is intentionally or otherwise diverted from the purposes of the trust, the wife may sue for and recover it. *Id.*

5. MARRIED WOMAN'S DEED, in which she is not joined by her husband nor privily examined, is invalid. *Cravens* v. *White*, 803.

6. PARTITION. — MARRIED WOMAN'S DEED IN VOLUNTARY PARTITION not acknowledged nor signed by the husband may be enforced when it appears that all parties in interest regard the property thus conveyed by her as part of the partition, and she has acted upon it as such, by accepting other property conveyed to her in the general partition. *Id.*

7. MARRIED WOMAN'S DEED AS EVIDENCE — DEFECTIVE ACKNOWLEDGMENT. —A certificate of an officer to a married woman's deed, not showing that she was known to him or proved to him to be the person whose name is subscribed to the deed, nor that she was examined by him privily and apart from her husband, and the deed explained to her, nor that she declared that she had willingly signed the same for the purposes and consideration therein expressed, is fatally defective, and insufficient to entitle the deed to registration, and therefore it is not admissible in evidence. *Hayden* v. *Moffatt*, 866.

8. MARRIED WOMAN'S DEED — DEFECTIVE CERTIFICATE OF ACKNOWLEDGMENT. — A certificate of an officer to a married woman's deed, stating that "she acknowledged the same freely and willingly," is not a substantial compliance with a statute requiring such certificate to state that she "acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same." *Id.*

9. MARRIED WOMAN'S DEED AS NOTICE. — WITHOUT SUCH ACKNOWLEDGMENT as the statute prescribes, there can be no conveyance of the lands of a married woman; and before such conveyance can be recorded so as to operate as notice, there must be attached to it a certificate of her acknowledgment in substantial conformity to the prescribed form. *Id.*

10. MARRIED WOMAN'S DEED PROPERLY ACKNOWLEDGED in the manner and under the circumstances prescribed by law conveys the title. *Id.*

11. MARRIED WOMAN'S DEED — RECORD AS NOTICE. — PROPER CERTIFICATE of an officer is sufficient evidence of the proper execution of a married woman's deed to admit it to record, and give it the effect of notice to subsequent purchasers. But if not properly acknowledged, the registration of the instrument is illegal, and does not constitute notice. *Id.*

12. MARRIED WOMAN'S DEED — RECORD OF, AS NOTICE. — In a suit brought for that purpose, the proper acknowledgment of a married woman to her deed may be shown, and judgment obtained correcting the certificate; but such proof and judgment will not validate the prior registra-

tion of the deed as defectively acknowledged, and give it effect as notice to subsequent purchasers. *Id.*

See CONFLICT OF LAWS, 2.

MASTER AND SERVANT.

1. CONTRACT FOR PERMANENT EMPLOYMENT, MEANING OF. — Where an employer agrees that the employment shall be permanent as long as the employee desires to make it so, in consideration of the latter's using his best efforts to extend the business, such agreement does not mean that the employment shall be for life, or for any fixed or certain period, but only that it shall continue indefinitely, and until one or the other of the parties shall wish for some good reason to sever the relation. *Lord* v. *Goldberg*, 82.
2. EMPLOYER JUSTIFIED IN TERMINATING CONTRACT OF HIRING WHEN. — Where an employer agrees to pay an employee a fixed minimum salary, upon the latter's representations as to the business at his command, with an understanding that the compensation shall be increased as the business increases, and the representations of the employee prove to be untrue, and the business does not justify the payment of the minimum salary promised, the employer is justified in refusing to continue the employment, unless the employee will accept for his services a fair and ratable proportion of the profits actually arising from the business controlled by him; and if such an offer is made to him, and refused by him, and he thereupon leaves the employment, his leaving will be deemed voluntary. *Id.*
3. MASTER'S LIABILITY FOR SERVANT'S WRONGFUL ACT. — When the master, by contract, express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own, and when the servant does what the master could not do, nor suffer to be done, without violation of the particular duty resting upon him, or when the servant omits to do that requisite to the full discharge of the master's incumbent duty, then the latter is responsible for the servant's wrongful or malicious act or omission; and whether the servant's act violative of the master's duty is willful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured party. *Dillingham* v. *Russell*, 753.
4. DUTY TO FURNISH SAFE MACHINERY. — Though a railway company need not furnish its employee with the best and most improved machinery, still it must use reasonable care in furnishing him with such as is reasonably safe, suitable, and adapted to the work to be performed. If the company, by negligence, fails to furnish such machinery and appliances, by reason of which the employee, in the discharge of his duty, ignorant of defects therein, and not chargeable with notice, actual or constructive, thereof, and exercising ordinary care, is injured, the company is liable in damages. *Galveston etc. R'y Co.* v. *Garrett*, 781.
5. DUTY TO WARN EMPLOYEE OF DEFECTIVE MACHINERY. — When a railway employee does not know of a defect in machinery furnished him by the company, and could not have ascertained it by the use of ordinary care, while the company does know of it, or is, under the circumstances, chargeable with such knowledge, it is bound to warn the employee, or respond in damages if he is injured. *Id.*

6. DUTY TO WARN EMPLOYEE OF DEFECTIVE MACHINERY OR UNUSUAL RISK. — A railway employee has a right to assume that the machinery furnished him by the company is safe, suitable, and adapted to the service in which it and he are employed. He assumes only the risks ordinarily incident to his employment, and such as he knows to exist, or may know by the exercise of ordinary care; and if a defect in the machinery or an uncommon risk exists, known to the company, but not known to him by the exercise of ordinary care, and of which he is not warned, the company must respond in damages, in case of injury to him through such defect or risk. *Id.*

7. DUTY AS TO MACHINERY AND APPLIANCES. — As between employer and his employee, it is the duty of the master to furnish suitable machinery, keep it in proper repair, and exercise reasonable care to prevent accidents. This duty is not discharged by furnishing suitable machinery and appliances in the first instance. The employer must see that they are kept so, and exercise reasonable and proper watchfulness as to their condition, and guard against dangers liable to arise from ordinary wear and use from which they may become weakened or unfit for the purpose for which they are supplied. *Johnson* v. *Spear*, 298.

8. DUTY AS TO MACHINERY AND APPLIANCES — The care required of a master in furnishing safe machinery and appliances for the use of his employees necessarily has relation to the business in which they are engaged, the wear and tear upon the machinery, and the varying exigencies which require vigilance and attention conforming in amount and degree to the circumstances of each particular case. *Id.*

9. DUTY AS TO SAFE MACHINERY AND APPLIANCES. — It is not necessary, to entitle a servant to recover for injuries arising from defective machinery, that the master had actual knowledge of such defects. It is enough to show that if he had exercised reasonable care and diligence, he would have ascertained its true condition by examination and inspection. *Id.*

10. NEGLIGENCE — DUTY OF OWNER TO KEEP MACHINERY IN SAFE CONDITION — LIABILITY TO THIRD PARTY. — Where the owner furnishes machinery to a contractor while work is being done upon his premises, and injury results through his fault in not keeping it in suitable and safe condision, he is liable to any servant of the contractor for an injury resulting to him from defects therein, and his liability arises out of his obligation to provide safe appliances for the contractor to use, and to keep his premises in safe condition, independent of any contract provision to that effect. *Id.*

11. NEGLIGENCE — OWNER'S DUTY TO KEEP MACHINERY AND APPLIANCES IN SAFE CONDITION — LIABILITY TO THIRD PERSONS. — An owner who furnishes a stationary engine on his premises, and the appliances connected therewith, for hoisting coal, to a contractor, is bound to keep the machinery and premises in safe condition; and is liable for an injury to the contractor's servant resulting from a defect in the machinery of which he knew, or by inspection might have known. *Id.*

12. MASTER'S DUTY TO FURNISH SAFE MACHINERY. — An employer is not bound to furnish his workmen with the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use; and if the machinery is such as is ordinarily used by persons in the same business, and such as can, with reasonable care, be used without danger to the employee,

that is all that is required of the employer, and is the limit of his responsibility. *Lehigh etc. Coal Co.* v. *Hayes*, 680.

13. NEGLIGENCE OF MINOR EMPLOYEE. — An infant employee nearly fourteen years of age is bound to avoid a danger which he knew was likely to occur immediately, and the master is not bound to warn him of such danger. *Id.*

14. DUTY OF EMPLOYER TO INSTRUCT YOUTHFUL AND INEXPERIENCED EMPLOYEE. — One who employs children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age, under similar circumstances, and is bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is his duty to so instruct such employees concerning the dangers connected with their employment, which, from their youth and inexperience, they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom. *Rolling Mill Co.* v. *Corrigan*, 596.

15. INFANT EMPLOYEE MAY RECOVER FOR INJURY TO WHICH HE CONTRIBUTES WHEN. — An infant employee whose employer has not instructed him, as it was his duty to do, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know, and was not advised, would be likely to injure him. *Id.*

16. CONTRIBUTORY NEGLIGENCE OF MINOR EMPLOYEE. — The capacity of a minor employee aged thirteen years and four months is the measure of his responsibility; and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger, but his employer will be held answerable. *Strawbridge* v. *Bradford*, 670.

17. CONTRIBUTORY NEGLIGENCE OF MINOR EMPLOYEE — QUESTION FOR JURY. — When employee aged thirteen years and four months is charged with contributory negligence, the question as to whether he had sufficient understanding to comprehend and guard against the peril he was in is for the jury under all of the circumstances of the case. *Id.*

18. EMPLOYEE DOES NOT ASSUME THE RISK OF THE SAFETY OF MACHINERY UNLESS HE KNOWS the danger, or it is so obvious that he will be presumed to know it. He takes the risk of known dangers, and not of others. *Myers* v. *Hudson Iron Co.*, 176.

19. EMPLOYEES CANNOT BE HELD, AS A MATTER OF LAW, TO HAVE ASSUMED THE RISK of a wire rope, drum, or other appliances on the surface of a mine used in lowering them to their place of labor underground, when it was no part of their duty to operate such appliances, and they were not clearly and obviously dangerous and unfit for use. An employee may rely somewhat upon the expectation that his master will provide machinery for lowering him to his work, and is therefore not called upon to be very strict in examining into its safety. *Id.*

20. EMPLOYER AND EMPLOYEE — SAFETY OF MACHINERY. — The verdict of a jury in favor of employees, who have been injured by the falling of a bucket in which they were riding, is supported by evidence which tends to show that there was a want of sufficient power in the brake, and the absence of anything to stop the bucket in case the brake should fail; that the defendants had in other places other contrivances, which were better than those used where the accident occurred; and that the original efficiency of the brake had been removed by use. *Id.*

21. AN EMPLOYER IS ANSWERABLE TO HIS EMPLOYEES WHO HAVE BEEN INJURED BY A DEFECT IN MACHINERY, though he had employed a machinist to put it in good order, if the latter failed to do so, though there was no reason to suppose him not to be well qualified for his duty. *Id.*

22. DUE CARE. — THE FACT THAT NO ONE HAD EVER BEFORE BEEN INJURED in descending the shaft of a mine is not conclusive that the mine-owner had exercised due care in selecting and keeping in proper repair the appliances by which such descent was effected, when an accident has actually occurred, and there is evidence tending to show that the original efficiency of such appliances has been impaired. *Id.*

23. JOINT NEGLIGENCE OF MASTER AND FELLOW-SERVANT. — Where the negligence of a fellow-servant and want of due care on the part of the master jointly contribute to an accident, the master may be held answerable to a servant injured thereby. *Id.*

24. EVIDENCE THAT OTHER MACHINERY WAS SAFER than that used by the defendant at the time when the accident occurred is admissible to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use. *Id.*

25. EVIDENCE OF FORMER SLIPS IN MACHINERY by which plaintiffs were injured, brought home to the knowledge of defendant's superintendent, is admissible, as tending to prove that the machinery was insufficient, and that the defendant did not exercise reasonable care in continuing its use. *Id.*

26. NEGLIGENCE — LIABILITY FROM USING DEFECTIVE MACHINERY. — While, as a general rule, an employee who continues to use machinery which he knows to be dangerous takes upon himself the risk of any accident that may result therefrom, still, if such employee, in pursuance of the promise of his employer to remedy the defect, and when the risk is not such as to threaten immediate danger, continues in his employment, and is injured, without fault on his part, the employer is liable. *Brownfield* v. *Hughes*, 667.

27. EVIDENCE. — EVIDENCE THAT AN EMPLOYEE WAS GENERALLY REPUTED to be infirm in his senses of sight and hearing, and in physical strength, is admissible for the purpose of proving that his employer either knew of these infirmities, or by the exercise of reasonable care would have known of them. *Monahan* v. *Worcester*, 226.

28. EXPLOSION OF STEAM-BOILER NOT PRIMA FACIE EVIDENCE OF NEGLIGENCE WHEN. — Where an employee of the vendor of a saw-mill, while assisting in setting up and getting the mill in order, is injured by the explosion of the steam-boiler in the mill, the mere happening of the accident does not raise a *prima facie* presumption of negligence on the part of the owner of the mill in managing and conducting the same. *Huff* v. *Austin*, 613.

See AGENCY, 3; CARRIERS; RAILROAD COMPANIES, 2, 9–12.

MORTGAGES.

1. AGREEMENT BY A MORTGAGEE TO ASSUME AND DISCHARGE A MORTGAGE ON THE PROPERTY CONVEYED TO HIM CANNOT BE RELEASED or annulled by the grantor after the mortgagee has elected to accept the agreement as made for his benefit, and has notified the grantee of such acceptance. *Gifford* v. *Corrigan*, 508.

2. FORECLOSURE — CONFIRMATION OF SALE. — An objection to the confirmation of a foreclosure sale that it was effected secretly, and without notice to defendant or his counsel, is without merit, when the record shows that defendant had full notice of the sale. It was his duty to inform his counsel. *Farmers' Bank* v. *Quick*, 280.

3. FORECLOSURE — COLLATERAL ATTACK ON DECREE. — An appeal from an order confirming a sale cannot be used to review the decree of foreclosure, when the court below had jurisdiction of the subject-matter and of the parties. *Id.*

4. FORECLOSURE — CONFIRMATION OF SALE. — An objection to the confirmation of a foreclosure sale alleging that the property was sold and bid in at a great sacrifice, and, in equity, ought to be resold, is without merit, in the absence of a showing that if a new sale were ordered, a larger or even as large a price could be obtained. *Id.*

See CHATTEL MORTGAGES; DOWER, 2; FIXTURES; GUARANTY; INSURANCE, 2.

MOTIONS AND ORDERS.

1. ORDER STAYING PROCEEDINGS CANNOT BE DISCHARGED WHEN. — When a judge has directed a stay of proceedings, and an undertaking on appeal has been executed pursuant to his direction, the lower court has no further control over the matter, and cannot discharge the order staying proceedings after it has been complied with. *Chuck* v. *Quon Wo Chong Co.*, 50.

2. ORDER MADE BY ONE DEPARTMENT OF SUPERIOR COURT MAY BE VACATED BY ANOTHER DEPARTMENT. — Where one department of a superior court makes an order authorizing the issuance of an execution, another department of the same court may, in a proper case, make an order vacating such order. It is the same court acting in each instance, and the fact that the orders are made in different departments is immaterial. *Dorland* v. *Hanson*, 44.

3. ORDER AUTHORIZING ISSUANCE OF EXECUTION, THOUGH APPEALABLE, MAY BE SET ASIDE. — An order authorizing the issuance of an execution, though an appealable order, may be attacked by a motion to vacate and set it aside, and the same is true of the sale made under it. *Id.*

See APPEAL AND ERROR, 5; JUDGMENTS, 7.

MUNICIPAL CORPORATIONS.

1. GENERAL POWERS. — A municipal corporation can only exercise such powers as are expressly granted, or those necessarily or fairly implied in or incident to the former, and those which are essential and indispensable to the declared objects and purposes of the corporation. *Huesing* v. *City of Rock Island*, 129.

2. EXERCISE OF GENERAL AND SPECIAL POWERS. — An express grant of power to pass ordinances upon a special subject, limited by the terms of the grant, in extent, object, or purpose, or in reference to the mode in which

it may be exercised, excludes all power to legislate upon that subject, beyond the prescribed limits, unless a contrary intent appears from the act. *Id.*

3. EXERCISE OF GENERAL AND SPECIAL POWERS. — Where both general and special powers are granted by the act of incorporation, the power to pass by-laws or ordinances relating to health and sanitary matters under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the act. The power to pass such by-laws under the general grant does not enlarge or annul the power granted by the special clause in relation to its various matters, but gives authority to pass reasonable by-laws upon all other matters within the scope of municipal authority. *Id.*

4. POWER TO MAINTAIN ABATTOIR. — The legislature may, by appropriate legislation, authorize an incorporated town to maintain an *abattoir*, or public slaughter-house. *Id.*

5. POWER TO MAINTAIN PUBLIC SLAUGHTER-HOUSE. — Where power is specially conferred upon incorporated towns to prohibit slaughter-houses or any unwholesome business or establishment within their limits, and the common council of the town is authorized, by appropriate ordinance, to regulate the location of any unwholesome business, and to cleanse, abate, or remove the same, such power does not authorize the passage of an ordinance to appropriate public funds for the erection and maintenance of a public *abattoir*, or slaughter-house, nor is such power expressly or impliedly granted by the general incorporation act of Illinois. *Id.*

6. VARIANCE BETWEEN ALLEGATION AND PROOF. — Under a complaint alleging negligence on the part of a city in excavating a dangerous hole or trench, and throwing up a dangerous embankment therefrom in the streets, by and under the direction of defendant, and in suffering the trench and embankment to be without protection or notice to travelers, evidence is admissible to show either a dangerous obstruction created by the city, and left unguarded, or a like obstruction created by some third person, and left unguarded by the city after notice of its existence. *Pettengill* v. *City of Yonkers*, 442.

7. MUNICIPAL CORPORATION MUST BE DEEMED TO HAVE KNOWLEDGE OF DANGEROUS CONDITION OF A STREET when it had been in such condition two months before an accident. *Id.*

8. MUNICIPAL CORPORATION HAS A DUTY TO KEEP ITS STREETS IN SAFE CONDITION FOR PUBLIC TRAVEL, and must exercise reasonable diligence to accomplish that end; and this rule is equally applicable, whether the act or omission complained of is that of the municipality, or of some third person. *Id.*

9. MUNICIPAL CORPORATION, WHEN PRIVATE OR PUBLIC IMPROVEMENTS ARE BEING MADE IN ITS STREETS, MUST GUARD THEM so as to protect travelers from resulting injuries therefrom, and if necessary to prevent accident, should, by some barrier, close the street against the public, so that no harm may happen if the work should be delayed. *Id.*

10. PUBLIC STREETS — NEGLIGENCE. — ONE USING A PUBLIC STREET MAY ASSUME THAT THE MUNICIPALITY, whose duty it is so to do, has kept the street in safe condition, and he is therefore not guilty of negligence in not exercising diligence to discover a dangerous obstruction. *Id.*

11. THE FACT THAT IT IS THE DUTY OF A CONTRACTOR, doing work on public streets, to maintain warning lights at an excavation he has made,

does not relieve the municipality from liability for an accident resulting from the negligent omission to maintain such lights. *Id.*

12. MUNICIPAL CORPORATION IS ANSWERABLE FOR ITS BOARD OF WATER COMMISSIONERS, WHEN SUCH BOARD, though created by special statute, is recognized as a department of the city government in the charter, and charged with the duty of making necessary surveys, and preparing a general plan and system of sewers for the city, and of preparing and approving specifications for constructing all sewers, drains, wells, fire cisterns, laying water-pipes, and erecting hydrants. *Id.*

13. TO DETERMINE WHETHER THERE IS A MUNICIPAL RESPONSIBILITY, the inquiry must be, whether the department whose misfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality. *Id.*

14. LIABILITY OF OFFICER OF CITY AND HIS CONFEDERATE FOR PROFITS REALIZED FROM THE USE OF THE FORMER'S KNOWLEDGE OBTAINED AS SUCH OFFICER. — If a member of a municipal board authorized to select and purchase a site for public purposes agrees with a third person to inform the latter of the site selected by such board, and that the latter shall thereupon purchase such site, and then sell it to the board at a profit, and the agreement is carried out through the aid of such officer, whereby the municipality is made to pay a higher price for the property than it could have been purchased for from the original owner, a joint action can be sustained against said officer and his confederate for the amount of profit by them realized. *Boston* v. *Simmons*, 230.

See NUISANCES.

MUTUAL BENEFIT ASSOCIATIONS.

See INSURANCE, 18.

NEGLIGENCE.

1. NEGLIGENCE IS NOT PRESUMED AGAINST PLAINTIFF; but when his own evidence tends to create such presumption, he must rebut it by sufficient proof to produce belief in the minds of the jury that negligence on his part did not in fact exist. *Missouri P. R'y Co.* v. *Foreman*, 785.

2. INSTRUCTIONS. — In an action to recover damages for injury from an engine, the jury is properly instructed that "the burden was on plaintiff to show a negligent act of the defendant which was the proximate cause of the injury"; and that "unless the omission to have a platform erected around the engine was the proximate cause of the injury," the plaintiff could not recover. It was also held proper, in this case, to refuse to charge, the evidence being conflicting, "that there is no evidence in this case that the omission to erect the platform was the proximate cause of the injury." *Brownfield* v. *Hughes*, 667.

3. THE WANT OF CONTRIBUTORY NEGLIGENCE MAY BE DETERMINED BY THE COURT AS A MATTER OF LAW when there are no facts in evidence from which any inference of negligence can arise. *McDonald* v. *Long Island R. R. Co.*, 437.

4. CONTRIBUTORY NEGLIGENCE. — A BRAKEMAN WHO IS IN THE ACT OF COUPLING CARS, and who, when the cars are four or five feet apart, sees that the bumper of the moving car is lower than that of the stationary

car, is not, as a matter of law, to be adjudged guilty of contributory negligence, in attempting to make the coupling. When the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger confronting him. *Goodrich* v. *New York etc. R. R. Co.*, 410.

5. A STRANGER COMING ON BUSINESS OR OTHERWISE UPON THE PREMISES OF ANOTHER has no right to choose for himself his means of ingress and egress, and has no right to determine where bulky articles shall be unloaded, or to unload them without inquiry or notice, and if in so doing he receives an injury, he cannot recover. *Bedell* v. *Berkey*, 370.

6. PERSONS WHO STRAY ABOUT OTHER PEOPLE'S PREMISES at their own will must look out for their safety in dangerous and unsafe places, or themselves suffer the consequences. *Id.*

7. NO ONE HAS ANY RIGHT TO ENDANGER HIMSELF, or to disturb other people's arrangements on their premises, by moving around in the dark in a strange room, into which he has entered of his own accord and without direction, and if he receives an injury in so doing, he is himself responsible for it. *Id.*

8. CONTRIBUTORY NEGLIGENCE OF DRIVER IMPUTED TO PASSENGER. — A driver of a private vehicle is under duty to stop, look, and listen before attempting to cross a railroad track, and failure to perform this duty makes him guilty of contributory negligence, barring recovery for injury from collision, and his negligence may be imputed to one who is riding with him by invitation and without compensation, and who knew the locality, and that a train was about due, that he was approaching the railroad track at a fast trot, and who sat with his back to the driver, and did not ask him to stop, look, or listen, or to permit him to get out. *Dean* v. *Pennsylvania R. R. Co.*, 733.

9. CONTRIBUTORY NEGLIGENCE OF DRIVER WHEN IMPUTED TO PASSENGER. — The negligence of the driver of a private vehicle cannot be imputed to a party riding with him by invitation and without compensation when such party is free from blame; still, the latter is liable for his own negligence. *Id.*

See CARRIERS, 9–11, 14; CORPORATIONS, 21; INFANTS AND INFANCY, 5, 6; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; TELEGRAPH COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. STATUTE OF LIMITATION ON NOTES PAYABLE ON DEMAND does not commence running until the day after that on which such notes bear date. *Seward* v. *Hayden*, 183.

2. PROMISSORY NOTE PAYABLE ON DEMAND IS DUE IMMEDIATELY WITHOUT DEMAND, and the statute of limitations commences to run at once from the time of its execution. *O'Neil* v. *Magner*, 88.

3. NOTE PAYABLE ON DEMAND AFTER DATE IS ORDINARY DEMAND NOTE payable at once, and may be sued on immediately after it is given. *Id.*

4. INDORSEMENT, FOR COLLECTION, of a draft or check is not a transfer of the title to the indorsee, but merely constitutes him the agent of the indorser to present the paper, demand and receive payment, and remit the proceeds. Nor does a different result follow from the fact that the indorser is credited, and the indorsee charged, with the amount of such draft or check, where it appears that the indorsee does not become

unconditionally responsible for such amount until the draft or check is actually paid. *Butchers' and Drovers' Bank* v. *Hubbell*, 515.

5. WHERE DRAFTS AND CHECKS ARE INDORSED TO A BANK FOR COLLECTION, and the course of business is for the collecting bank to remit but once a week, it is under no obligation to remit the identical moneys collected, and if it pays them out in the usual course of business, it becomes the debtor of the bank which sent such drafts or checks, and the position of the latter is not different from that of an ordinary creditor. *Id.*

6. LACHES. — THE OWNER OF A DRAFT OR CHECK INDORSED FOR COLLECTION TO A BANK, which subsequently makes an assignment for the benefit of its creditors, is not guilty of laches because he delays for sixteen days after having notice of the assignment to demand of the assignee the proceeds of such drafts or checks by him received. *Id.*

7. CHECK PAYABLE TO NON-EXISTING PERSON NOT TREATED AS PAYABLE TO BEARER WHEN. — The doctrine which treats a check or bill made payable to a fictitious person or order, as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. It does not apply to a check made payable to a non-existing person or order, the drawer of which has been induced by the fraud of a third person to so draw it, in the belief that the payee was a real person, and intending that payment should be made to such person. Where, therefore, a bank depositor is, by the fraud of a third person, induced to draw his check on the bank payable to a non-existing person, or order, in ignorance of the fact, and intending no fraud, the bank has no right to pay the check and charge the amount to the depositor upon its being presented by such third person indorsed by him and purporting to be indorsed by the person named therein as payee. *Armstrong* v. *National Bank*, 655.

8. BANK IS BOUND TO SATISFY ITSELF OF GENUINENESS OF INDORSEMENT on a check made payable to a certain person or order; and the fact that the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such a person, when in fact there is not, does not excuse it for paying the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person. *Id.*

9. SURETY — FRAUD IN OBTAINING SIGNATURE. — The non-performance of an oral agreement made at the time a note is signed by one as surety, that he shall not be liable thereon, and which agreement is at variance with the terms of the note, is not such fraud as will release such surety. *Kulenkamp* v. *Groff*, 283.

10. SURETY. — PROOF OF AN ORAL AGREEMENT made at the time a note is signed by one as surety, that he should not be liable thereon, is not admissible under a claim of fraud to defeat the terms and purpose of the note. *Id.*

11. SURETY — EVIDENCE TO SHOW WANT OF CONSIDERATION FOR SIGNING NOTE. — Proof of the non-performance of an oral agreement made at the time a note is signed by one as surety, that he shall not be liable thereon, is admissible to show want of consideration for the promise made in the note, and that it was so signed simply to accommodate the payee therein. *Id.*

12. CONSIDERATION. — CONTRACT OF SURETYSHIP NOT UNDER SEAL must be supported by a sufficient consideration. *Id.*

See LIMITATION OF ACTIONS, 4.

NEWSPAPER LIBEL.

See LIBEL AND SLANDER, 1-7.

NEW TRIAL.

GRANTING AN ORDER FOR A NEW TRIAL on the motion of a defendant who, with other defendants, is jointly and severally sued, vacates the former judgment, and operates as a new trial as to all of the defendants. *Gulf etc. R'y Co.* v. *James*, 743.

NOTICE.

See LIS PENDENS; MARRIED WOMEN, 8-11.

NUISANCES.

1. LIABILITY OF CITY FOR MAINTAINING. — A city having control and possession of a dump-yard and burying-ground so negligently and carelessly kept as to constitute a nuisance is liable in damages to an adjoining land-owner injured thereby. *City of Fort Worth* v. *Crawford*, 840.
2. SUFFICIENCY OF PETITION AGAINST. — A petition in an action against a city for creating and maintaining a nuisance containing the necessary averments, and alleging that plaintiff's home was free of all noxious and offensive odors, and was a desirous and healthy abode prior to the time defendant committed and permitted the nuisances complained of, describing them, is sufficient, without direct averment to negative the supposition that the sickness and injury to plaintiff and his family were caused by other than the ground constituting the foundation of the action. *Id.*
3. LIABILITY OF CITY FOR MAINTAINING. — In an action against a city for creating and maintaining a nuisance, it is not necessary to plead the character and nature of its possession; and if the proof shows a maintenance of the nuisance while in the possession and control of the city, its liability attaches, no matter how it obtained possession. *Id.*
4. EVERY PERSON HAS THE RIGHT to have the air diffused over his premises free from noxious vapors and noisome smells that would not exist there except for the acts of the party complained of, and which are prejudicial to health, or nauseous to the smell, or trench upon the rights of the person affected thereby, but they must be of such character as to be offensive to the senses or to produce actual physical discomfort, naturally interfering with the comfortable enjoyment of property, though they need not be hurtful or unwholesome. *Id.*
5. LIABILITY OF CITY FOR MAINTAINING. — When a municipal corporation has ample power to remove a nuisance injurious to health, endangering the safety or impairing the convenience of its citizens, or when in the prosecution of a public work it creates or maintains a nuisance, it is liable for all the injuries resulting from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its unlawful acts. *Id.*

OFFICE AND OFFICERS.

1. OFFICER DE FACTO.—ONE SUED FOR INTERFERING WITH THE PERSON OR PROPERTY OF ANOTHER, and attempting to justify on the ground that his act was properly done by him as a public officer, must show, not

merely that he was an officer *de facto*, but that he was duly and regularly qualified to act as such officer. *Short* v. *Symmes*, 204.

2. OFFICER DE FACTO. — ONE MAKING AN ARREST AS A POLICE-OFFICER MUST, WHEN SUED FOR ASSAULT AND FALSE IMPRISONMENT, prove his legal qualifications as such officer, or that he publicly acted and was recognized as such officer before or after act brought in question. *Id.*

3. INCOMPATIBLE OFFICES. — Office of county commissioner and that of postmaster are incompatible, independent of any statute to that effect, under constitutional provision that any person holding an office of trust or profit under the United States cannot at the same time hold an office in the state to which a salary is attached. *De Turk* v. *Commonwealth*, 705.

4. INCOMPATIBLE OFFICES. — Where a person is appointed to a state office who is already holding a federal office, and these offices are made incompatible by the state constitution, his acceptance and entering upon the duties of the state office does not create a vacancy in the federal office; but his right to hold the former may be questioned if he attempts to hold them both. *Id.*

5. INCOMPATIBLE OFFICES. — Where a person is holding a federal and a state office, made incompatible by state constitution, but before answer and issue joined in *quo warranto* to oust him from the state office he formally resigns and surrenders the federal office, his title to the state office is thereby perfected so that he cannot be ousted therefrom by judgment in the *quo warranto* proceeding. *Id.*

6. FILING OF PAPERS. — Papers are properly filed when delivered to the proper officer, and by him received to be kept on file. *Beebe* v. *Morrell*, 288.

See ARREST; EXECUTIONS; LIBEL AND SLANDER, 18–23.

ORDERS.

See MOTIONS AND ORDERS.

PARENT AND CHILD.

COMPENSATION FOR SERVICES RENDERED BY CHILD. — When a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged parent, he must prove an express and actual contract definite in its terms, and proof of loose declarations of gratitude and of an intention to compensate, made by an old man in the extremity of his last sickness, will not be sufficient to support the claim. *Zimmerman* v. *Zimmerman*, 720.

PAROL TESTIMONY.

See AGENCY, 7–10; CHARITABLE USES, 1; CONTRACTS, 2; DEEDS, 1–3; FRAUDULENT CONVEYANCES, 4; SPECIFIC PERFORMANCE.

PARTNERSHIP.

1. EFFECT OF DISSOLUTION BY DEATH. — The retention and use of the firm name after the death of one of the partners creates no liability on the estate of the deceased, and the surviving partner, by accepting a draft in the firm name, makes himself personally liable therefor. *Woodward* v. *Brooks*, 104.

2. INSANITY OF ONE PARTNER DOES NOT, PER SE, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. This will not be done if the malady is temporary only, with a fair prospect of recovery within a reasonable time. *Raymond* v. *Vaughn*, 112.

3. EFFECT OF INSANITY OF PARTNER. — An adjudication by the county court that one partner is temporarily insane does not dissolve the partnership; and upon a bill filed for that purpose, it has no other effect than to establish the insanity. In such case equity will look to the effect produced upon the partnership relations, and refuse to dissolve them and apply the assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation. *Id.*

4. PARTNER EMBRACES CHARACTER OF BOTH PRINCIPAL AND AGENT. — For himself, with respect to the partnership, he acts as principal, and agent for his partners, with an interest in all that pertains to the business of the firm. If, therefore, for any reason, one member of the firm assumes control, he must, while so controlling, manage for and in the interest of all the partners. His duty is analogous to that of a trustee, and he is not allowed to derive personal profit from the use of the partnership assets or business or good-will of the firm. *Id.*

5. EFFECT OF INSANITY OF PARTNER. — After an adjudication of the insanity of one partner, the continuing partner may apply for a dissolution of the partnership if he so desires; or if it is a partnership at will, he may dissolve it of his own volition. *Id.*

6. EFFECT OF CONTINUING BUSINESS AFTER INSANITY OF ONE PARTNER. — Where one partner has been adjudged insane, and the remaining partner continues the business as before, without objection or notice to any one, it is presumed that he did not intend a dissolution of the firm, but that he waited to determine whether the incapacity of his partner would prove merely temporary, and it would become practicable for him to resume business. So long as he thus continues to carry on the business, without seeking to dissolve the partnership, there is no dissolution, nor is he excused from accounting for the profits derived by him from the business of the firm. *Id.*

7. PARTNER'S RIGHT TO COMPENSATION FOR CLOSING BUSINESS AFTER DISSOLUTION. — A partner claiming compensation for personal services, and for closing the business after dissolution of the partnership, must show that he performed a greater amount of labor than his partner, to enable him to recover. *Redfield* v. *Gleason*, 889.

8. BANKERS AND BROKERS — PRESUMPTION AS TO SCOPE OF BUSINESS OF. — Where it appears that certain persons were doing business as bankers and brokers, and that they by their managing partner agreed to purchase certain bonds, and that if the purchaser should become dissatisfied with the purchase, that they would take them off his hands at what they cost him, it will not be presumed that this contract was beyond the scope of the business of the firm nor of the managing partner's authority. *Johnston* v. *Trask*, 394.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4–6; EXECUTIONS, 10; EXEMPTIONS.

PAYMENT.

See BANKS AND BANKING, 3; DURESS, 1.

PERPETUITIES.

See WILLS, 10.

PLEADING.

NON-PAYMENT, SUFFICIENT ALLEGATION OF. — An allegation in a complaint in an action to recover money alleged to be due on a contract, that "the defendant, although thereto often requested by plaintiff, has failed, neglected, and refused to pay" the money, or any part thereof, is a sufficient allegation of non-payment. *O'Hanlon* v. *Denvir*, 19.

See CONTRACTS, 10; FRAUD, 1–5; MARRIAGE AND DIVORCE, 2; MUNICIPAL CORPORATIONS, 6; NUISANCES, 2.

POLICE POWER.

See CONSTITUTIONAL LAW, 6, 7.

POWER OF ATTORNEY.

1. WARRANT OF ATTORNEY TO CONFESS JUDGMENT MUST BE STRICTLY CONSTRUED. *Spence* v. *Emerine*, 634.
2. WARRANT OF ATTORNEY ATTACHED TO SEALED NOTE PAYABLE TO PAYEE or bearer, authorizing "any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio and confess judgment against us for the amount due thereon, with interest and costs, and to release all errors and the right of appeal," does not confer authority to confess judgment against the maker of the note in favor of a holder to whom the payee transferred it by delivery; and judgment cannot, by virtue of such warrant of attorney, be rendered against the maker of the note in favor of such holder without summons or other notice to the maker of the bringing of the action. *Id.*

POWER OF SALE.

See CHATTEL MORTGAGES, 1, 2; EXECUTORS AND ADMINISTRATORS, 1, 2.

PRESCRIPTION.

See ADVERSE POSSESSION; WATERCOURSES, 2.

PROCESS.

IMMUNITY FROM SERVICE OF SUMMONS, WHEN PARTY ENTITLED TO. — A person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is privileged from the service of summons while going to, remaining at, and returning from the place of such hearing. *Andrews* v. *Lembeck*, 547.

See ATTACHMENT, 3.

PUBLIC LANDS.

1. PUBLIC LANDS MAY BE CLEARED FOR CULTIVATION BY PERSON IN POSSESSION. A person in possession of public lands of the United States has a right to clear them of scrub-oaks and other wild shrubbery, for the purpose of preparing them for cultivation. *O'Hanlon* v. *Denvir*, 19.

2. IMPROVEMENTS ON PUBLIC LANDS OF THE UNITED STATES MAY BE SOLD by one in the mere possession thereof, and will constitute a good consideration for the promise of the buyer to pay the price agreed upon. *Id.*

RAILROAD COMPANIES.

1. POWER OF GENERAL MANAGER TO MAKE LEASE. — A general manager of a railway with power to manage and control its stock-yards has no power to lease them, and turn over their control and management to another, unless expressly authorized so to do in writing. *Rue* v. *Missouri P. R'y Co.*, 852.

2. NEGLIGENCE — RAILROAD'S LIABILITY FOR WRONG OF CONDUCTOR. — If a conductor of a street-railroad advances in a threatening manner towards and kicks at a boy who is trespassing on the platform of the car, and the boy, to avoid the kick, jumps off the platform, landing in the middle of another track of the same railway, where he is run over by another car belonging to the same company, which was running at an unlawful speed, the corporation is answerable for the injuries thus received by the boy, though the boy did not see nor look for the car by which he was injured. Except for the act of the conductor, the haste of the boy would seem heedless, and his omission to look for the approaching car would afford evidence of carelessness; but his conduct has to be weighed with that of the conductor; and whether the boy was in fact influenced by the threat of assault, and how far the obedience to the instinct of self-preservation from a visible danger should excuse the failure to look for another not then before him, were questions for the jury. *McCann* v. *Sixth Ave. R. R. Co.*, 539.

3. LIABILITY FOR FIRE. — Where a fire has its origin from sparks negligently allowed to escape from a railroad company's engine, it is liable in damages, no matter how strenuous efforts may have been afterwards made by the company's servants to extinguish the fire. *Missouri Pacific R'y Co.* v. *Platzer*, 771.

4. DUTY TO PREVENT AND LIABILITY FOR FIRES. — Railroad companies are not only required to exercise a high degree of care to prevent the kindling of fires by escaping sparks from their locomotives, but are also under obligation to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care. *Id.*

5. DUTY TO EXTINGUISH FIRES. — Where a fire has been kindled by escaping sparks from a railroad company's locomotive, when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, the company is still under duty to use ordinary care to extinguish the fire, no matter whether it arose on the company's right of way or on contiguous lands; and failure to exercise such care as the circumstances of the case indicates to a prudent man as proper gives a cause of action for injury resulting. In such case, the question of due diligence in extinguishing the fire is for the jury. *Id.*

6. DUTY TO MAINTAIN CROSSING, AND LIABILITY FOR NEGLIGENCE IN ITS CONSTRUCTION. — When a railway company voluntarily assumes to maintain a crossing over its track for the use of the public, knowing that it is so used, it is bound to keep it in safe condition, and is liable for any injuries resulting to passengers over the crossing by reason of its negligent construction. *Missouri P. R'y Co.* v. *Bridges*, 856.

7. SIDE-TRACKS EXTENDED FROM THE MAIN LINE OF A RAILROAD onto the lands adjoining the surveyed limits of the road as located, under a parol license from and agreement with the land-owners, but without acquiring title to the land, are a part of the main line, and, as to them, the same rights are conferred upon the company and the same obligations imposed as exist as to the main line. The right to prevent another railroad from crossing the side-tracks is good, under such license, until the latter is revoked. *Barre R. R. Co.* v. *Montpelier etc. R. R. Co.*, 877.

8. RIGHT OF ONE ROAD TO LAY TRACK ON THE LANDS OF ANOTHER. — One railroad company has no right to lay its track on the land of another railroad company unless there is an absolute necessity therefor. That it would be a convenience so to do does not confer the right. *Id.*

9. RALIROAD COMPANY USING THE CARS OF ANOTHER CORPORATION UPON ITS ROAD IS BOUND to inspect them just as it would inspect its own cars. This duty it owes as master to its servants, and it is responsible to them for the consequence of such defects as would have been discovered by ordinary inspection. This examination of the cars of other roads must be performed before they are placed in trains, or furnished to employees to be used. *Goodrich* v. *New York etc. R. R. Co.*, 410.

10. EMPLOYEES OF A RAILROAD COMPANY, WHEN THE CARS OF ANOTHER RAILROAD ARE FURNISHED TO THEM FOR USE, have the right to assume that, as far as ordinary care can accomplish it, the cars are suitably equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk and danger through the negligence of their employer. *Id.*

11. IT IS NOT THE DUTY OF THE BRAKEMEN OF A RAILROAD COMPANY TO EXAMINE CARS TO ASCERTAIN WHETHER THE COUPLING APPLIANCES are in proper condition before undertaking to make the coupling. The duty of the examination in the first instance rests upon the master. *Id.*

12. DEGREE OF VIGILANCE REQUIRED FROM A RAILWAY CORPORATION IN THE EXAMINATION OF THE CARS OF ANOTHER RAILWAY, which it furnishes to its employees for their use, to ascertain that such cars are safe, is measured by the danger to be apprehended and avoided. *Id.*

13. BRAKEMAN OF A RAILWAY COMPANY DOES NOT ASSUME THE RISK OF BEING INJURED by the coming together of cars which he is coupling, if they could not have come together if the bumpers had been in proper condition. *Id.*

14. EFFECT OF RECORDING LOCATION FOR ROAD. — A railroad company, by recording the surveyed location for its road, acquires a prior, vested, and exclusive right to build on the line of location, as against another railroad company which subsequently purchases the land on such location, or which, having previously purchased or agreed to purchase such land, has not recorded its conveyance or agreement of purchase. *Barre R. R. Co.* v. *Montpelier etc. R. R. Co.*, 877.

15. ESTOPPEL ARISING FROM PERMITTING MORTGAGE, UPON LANDS OVER WHICH A RAILWAY IS CONSTRUCTED, TO BE FORECLOSED. — Where a railroad company has constructed and operated its road across mortgaged premises with the consent of the parties, and has been made a party to the foreclosure of the mortgage, it cannot, in an action to condemn the land for railroad purposes, set up an adverse title to a part of the premises acquired by it while they were mortgaged, as such title might have been litigated in the foreclosure suit. *St. Johnsbury etc. R. R. Co.* v. *Willard*, 886.

16. EMINENT DOMAIN — TRESPASS. — A railroad company which enters upon land with the consent of the owner or mortgagor, and, without objection from any one, constructs and operates its road for fifteen years without acquiring title to the land, or paying land damages, or making any arrangement in respect thereto, does not thereby constitute itself a trespasser as to the mortgagor or owner, and the latter is not entitled to the improvements or their value as damages, but only to actual compensation for the land taken. *Id.*

17. PURCHASE OF ONE BY ANOTHER DOES NOT WORK CONSOLIDATION. — A purchase at sheriff's sale of one railroad franchise and corporate property by another railroad company does not destroy the corporate existence of the former. That existence continues as before, neither enlarged nor restricted. The purchaser takes the property freed from liability for existing debts not secured by prior liens and from all obligations strictly personal in character. *Gulf etc. R'y Co.* v. *Newell*, 788.

18. PURCHASE DOES NOT CREATE CONSOLIDATION. — Ownership by purchase of one railroad by another railroad company will not alone operate a consolidation of the two without the consent of the state. This consent will not be implied, nor can it be effectual without the consent of the stockholders of the companies to be consolidated. *Id.*

19. RIGHTS OF PURCHASER UNDER EXECUTION. — A person or corporation who acquires the property and franchise of a railway corporation through sale under execution takes them freed from all liability for former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner. *Id.*

20. PURCHASE UNDER EXECUTION — CONSOLIDATION — ESTOPPEL. — Purchase of the property and franchise of one railway under execution by another railway company does not of itself work a consolidation of the two companies, nor is the purchaser estopped from denying the fact of consolidation. *Id.*

21. OWNERSHIP — DUTY TO PUBLIC. — A railway, no matter who owns it, is charged with every duty and obligation to the public imposed upon it by its charter and the nature of its business, and from them it cannot escape without legislative permission, so long as its corporate existence continues, no matter if it is leased or otherwise controlled and operated by another person or corporation. *Id.*

22. OWNERSHIP — DUTIES TO PUBLIC. — When a railway company's charter imposes upon it obligations and responsibilities continuous in their nature, in the discharge of which individuals, as distinguished from the public, have an interest, such duties and obligations rest upon it in the hands of whomsoever may become the owner of its property and franchise, and such subsequent owner is bound by any covenant running with the property purchased. *Id.*

23. LIABILITY OF SLEEPING-CAR COMPANY. — A sleeping-car company which hires cars to railroads, reserving only the right to collect fares for the use of berths, and to retain on each car its own conductor and porter, is not liable as a common carrier or innkeeper, but must exercise reasonable care to guard passengers from theft; and if through want of such care, the personal effects of a passenger, such as he may reasonably carry with him, are stolen, the company is liable therefor. *Pullman Palace Car Co.* v. *Matthews*, 873.

24. LIABILITY OF SLEEPING-CAR COMPANY FOR NEGLIGENCE. — A sleeping-car passenger's negligence furnishing an opportunity to the company's

servants to steal his money will not release it from its obligation to protect him from such servants' wrongful acts. *Id.*

See APPEAL AND ERROR, 6; MALICIOUS PROSECUTION, 4; NEGLIGENCE, 4, 8.

RAPE.

See CRIMINAL LAW, 14.

RECEIVERS.

1. RECEIVERS APPOINTED BY UNITED STATES COURTS ARE SUBJECT TO SUIT in any court having jurisdiction of the subject-matter, without asking leave of the court which appointed them. *Dillingham* v. *Russell*, 753.
2. JURISDICTION TO ENTER JUDGMENTS AGAINST. — No court can interfere with the custody of property held by another court through a receiver, but may establish, by its judgment, a debt against the receivership, which must be recognized by the court appointing the receiver, and is not open to revision by it, if the court rendering it had jurisdiction of the subject-matter and of the parties. *Id.*
3. JURISDICTION TO ESTABLISH JUDGMENTS AGAINST. — The manner in which a judgment rendered against a receiver in another jurisdiction shall be paid, and the adjustment of equities between persons having claims on the property and effects in the hands of such receiver, are under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts to conclusively establish by judgment the existence and extent of a claim. *Id.*
4. POWERS OF RECEIVERS APPOINTED IN ONE STATE are only co-extensive with the jurisdiction of the court appointing them, but they may be permitted, by comity, to recover possession of property in another state, if no citizen nor suitor of that state is thereby prejudiced or injured. *Sercomb* v. *Catlin*, 147.
5. CONTEMPT IN INTERFERING WITH RECEIVER'S POSSESSION. — Though a receiver may not have reduced the funds of the insolvent to his possession, and though part of them may be in another state, still the title to all of them and the constructive possession of them is in him by virtue of his appointment; and a citizen within the jurisdiction of the court appointing him cannot attach the funds in the other state without the sanction of that court, and by so doing, and refusing to dismiss his suit, he is guilty of and may be punished for contempt. *Id.*
6. ATTACHMENT OF PROPERTY IN CUSTODY OF FOREIGN RECEIVER. — A receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation and carry on its business, and who in pursuance of his authority as such receiver has taken the property into his actual possession, within the jurisdiction of the court by which he was appointed, cannot hold such property against the claim of a citizen of California, who, upon finding the property in that state, has, in pursuance of its laws, caused it to be attached as security for his just demands against the railway company. *Humphreys* v. *Hopkins*, 76.
7. REPLEVIN BY FOREIGN RECEIVER. — A receiver appointed by the court of another state, for the benefit of creditors there, can only sue in this state, as such receiver, on the ground of comity; and the principle of comity will not be so far extended as to sustain a suit by him to replevy property of the debtor which has been attached in this state by a creditor residing therein, notwithstanding the property when attached was in the

actual possession of the receiver, and had been brought by him from the state where he was appointed. *Id.*

REMAINDERS.

1. CONTINGENT REMAINDER. — Where a will provides that upon the death or remarriage of the widow of the testator the executors shall proceed to divide his estate among his children, or such of them "as may be then alive, or the lawful issue of such of them as may be dead leaving lawful issue," each child, or if dead, his issue, takes only a contingent remainder dependent upon the termination of the particular estate, and upon his or their being alive at that time. *Haward* v. *Peavey*, 120.
2. REMAINDER IS VESTED WHEN A PRESENT INTEREST PASSES to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates. *Id.*
3. CONTINGENT REMAINDER IS ONE LIMITED TO TAKE EFFECT, either to a dubious or uncertain person, or upon a dubious and uncertain event. *Id.*
4. EVERY ESTATE IN REMAINDER SUBJECT TO A CONTINGENCY OR CONDITION is not necessarily a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened and thereby becomes certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition. *Id.*
5. CONTINGENT REMAINDER IS NOT SUBJECT TO LEVY AND SALE against the party entitled to it, and no title passes to a purchaser by sheriff's deed. *Id.*

REPLEVIN.

See RECEIVERS, 7.

RES JUDICATA.

See CORPORATIONS, 3; JUDGMENTS.

SALES.

See EQUITY, 2; FRAUD; FRAUDULENT CONVEYANCES, 1-3; STATUTE OF FRAUDS, 4.

SET-OFF AND COUNTERCLAIM.

See APPEAL AND ERROR, 4.

SLEEPING-CAR COMPANIES.

See RAILROAD COMPANIES, 22, 23.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE WITH PAROL VARIATION WITHOUT CROSS-BILL. — Where specific performance of a written agreement is demanded, and parol evidence is admitted to prove a contemporaneous oral agreement alleged in the answer, and varying the written contract, the court may decree specific performance of the contract with the parol variation upon the allegations in the answer, without requiring a cross-bill. *Redfield* v. *Gleason*, 889.

STATUTE OF FRAUDS.

1. ORAL PROMISE TO PAY DEBT OF ANOTHER. — An oral promise by a mortgagee to pay the debt of his mortgagor, given in consideration of a forbearance to attach property of the mortgagor not included in the mortgage, is void under the statute of frauds, although the mortgagee converted such such property to his own use. *Stewart* v. *Jerome*, 252.
2. PROMISE TO PAY DEBT OF ANOTHER. — There must be a consideration to support every promise, whether evidenced by writing or not, and where the promise is to answer for the debt, default, or misdoing of another, such promise must be evidenced by writing. *Id.*
3. PROMISE TO PAY DEBT OF ANOTHER. — A special promise to pay the debt of another, given in consideration of a forbearance to attach property of the debtor, to which neither the promisor nor the creditor has any right, lien, or title, is void under the statute of frauds. *Id.*
4. AGREEMENT TO REPURCHASE. — An oral contract by which a person sells his own chattels or choses in action for more than fifty dollars, payment and delivery being made, and agreeing to take them back from and to repay the purchase price to the purchaser on demand, is an entire contract, and the promise to take back the property and repay the purchase price is not void by the statute of frauds. *Johnston* v. *Trask*, 394.

STATUTES.

1. SECTIONS OF STATUTE IN PARI MATERIA MUST BE READ TOGETHER, and effect given to each. *Gleason* v. *Spray*, 47.
2. CONSTRUCTION OF STATUTE PRESCRIBING MODE OF DOING ACT. — When a statute says an act cannot be done unless performed in a certain mode, the inhibition against performing it in any other way is just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose. *Id.*

See COMMERCIAL LAW; CONSTITUTIONAL LAW; COUNTIES; EVIDENCE, 2.

STREET-RAILROAD COMPANIES.

See CARRIERS, 21–24.

SUICIDE.

See CRIMINAL LAW, 15; INSURANCE.

SUMMONS.

See PROCESS.

SURETYSHIP.

See APPEAL AND ERROR, 3; EXECUTORS AND ADMINISTRATORS, 5, 6; NEGOTIABLE INSTRUMENTS, 9–12.

TAXATION.

NOTICE OF OPPORTUNITY TO HAVE ASSESSMENTS REVIEWED AND CORRECTED. — If a public statute designates a time when and a place where taxpayers may appear for the purpose of having assessments against them and their property reviewed and corrected, this affords to them adequate notice and an opportunity to be heard, and an assessment made under

such statute is not void on the ground that it deprived the tax-payers of their property without due process of law. *People* v. *Turner*, 498.

See CORPORATIONS, 16–22.

TELEGRAPH COMPANIES.

1. CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE VOID. — A stipulation in the printed blanks used by a telegraph company exempting it from liability for its negligence in the transmission of unrepeated messages beyond the price received for sending the same, is unreasonable and void as against public policy. *Gillis* v. *Western Union Tel. Co.*, 917.

2. DEGREE OF CARE DUE FROM — STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE VOID. — Telegraph companies are bound, in the discharge of their duties to the public, to exercise that degree of care and skill that careful and prudent men exercise in like circumstances, and they cannot restrict this liability by contract or notice, nor can they stipulate against liability for negligence of any kind. *Id.*

3. LIABILITY FOR DELIVERY OF CHANGED MESSAGE. — A telegraph company, with notice of the purpose for which a message is sent, is liable to the sender for all damages and expense naturally and proximately resulting from its negligence in delivering the message in a changed condition. *Western Union Telegraph Co.* v. *Edsall*, 835.

4. NOTICE OF PURPOSE OF TELEGRAM. — When a telegraph company is given notice of the main purpose for which a telegram is sent, it is chargeable with notice of whatever the dispatch suggests, and of every incidental fact attending the transaction which it could have ascertained by the most minute inquiry; and if, under such circumstances, it delivers a changed telegram, it is liable for all damages naturally resulting from its negligence in failing to make such inquiries. *Id.*

5. NEGLIGENCE OF TELEGRAPH COMPANY in delivering a changed telegram cannot be attributed to the receiver thereof, who acts upon its direction, when there is nothing in the message as received to suggest a doubt as to its accuracy. *Id.*

6. LIABILITY FOR NEGLIGENCE. — The receiver of a telegraphic dispatch may maintain an action against the company, through whose negligence the message has been altered or changed, for such loss or damage as he has sustained by reason of having been led to act upon the dispatch, and proof of such alteration is *prima facie* proof of the negligence of the company. It must then assume the burden of showing that the error was caused by an agency for which it is not liable. *Western U. Tel. Co.* v. *Dubois*, 109.

7. REMEDY AGAINST, FOR NEGLIGENCE. — Where no contract relation exists between the receiver of a dispatch and the telegraph company, the remedy of the former for negligence in transmitting the message is in an action of tort. *Id.*

8. ARE COMMON CARRIERS and public servants, and are bound to act whenever called upon, their charges being paid or tendered. The extent of their liability is to transmit correctly the message as delivered. *Id.*

9. LIABILITY FOR NEGLIGENCE, AND MEASURE OF DAMAGES. — When the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by a telegraph company, he may recover damages in tort. In such a case, the measure of damages is compensation for his actual loss, following as the natural and proximate consequence of the company's act. *Id.*

10. EVIDENCE — TRANSACTIONS BY TELEGRAPH. — Where a telegraph company contracts to furnish an oil broker with accurate quotations of prices of oil, and to transmit his messages for purchases and sales, he may show, when sued on the contract, the quotations furnished and directions given in reliance thereon; and his testimony as to purchases and sales made under such directions, at places where he was not personally present, is admissible, and cannot be excluded under the rule requiring the production of the best evidence, as the purpose of that rule is to exclude evidence merely substitutional. *Western Union Tel. Co.* v. *Stevenson*, 687.

11. TELEGRAPH COMPANIES — WAIVER OF CONDITIONS. — A rule printed on a telegraph company's blanks restricting its liability for the accuracy of messages transmitted to such as are repeated, is reasonable, and binding upon one sending a message with knowledge of it, unless it is waived by the company. If the company receives and delivers messages orally, it then becomes a question for the jury, under the evidence and circumstances of the case, whether the company, by dispensing with the use of blanks, did not intend to relieve its patrons from the stipulations contained therein. *Id.*

12. TELEGRAPH COMPANIES — LIABILITY FOR INACCURATE MESSAGE. — Where a telegraph company has contracted to furnish an oil merchant with quotations of the price of oil, he has a right to rely upon their accuracy, and the company is liable to him for any loss resulting to him from an inaccurate quotation received and acted upon. *Id.*

TELEPHONE COMPANIES.

1. TELEPHONE COMPANIES ARE COMMON CARRIERS OF SPEECH FOR HIRE, and bound to serve all persons and corporations alike, upon their tender of equal pay for equal service, and compliance with the company's reasonable rules and regulations, notwithstanding an agreement between them and the patentee and licensor that the use of the telephone is to be restricted to a portion of the public. *Commercial Union Tel. Co.* v. *New England Tel. etc. Co.*, 893.

2. CONTRACT RESTRICTING USE OF TELEPHONE VOID. — A contract between the patentee and licensor of the telephone and telephone companies restricting the use thereof to certain portions of the public is void. *Id.*

TENANTS IN COMMON.

See CO-TENANCY.

TORT-FEASORS.

1. CONTRIBUTION AMONG WRONG-DOERS. — One of several joint wrong-doers cannot, by paying off a judgment obtained against them all, and taking a fictitious and fraudulent assignment of the judgment in the name of his son, enforce contribution from the other wrong-doers. *Boyer* v. *Bolender*, 723.

2. VERDICT AGAINST ONE OF SEVERAL WRONG-DOERS, VALIDITY OF. — In actions growing out of that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence, each of the wrong-doers when sued is compelled to bear the responsibility of all. Therefore, the fact that a verdict is found against one of such defendants without mentioning his co-defendants will not alone be sufficient to impair its validity. *Gulf etc. R'y Co.* v. *James*, 743.

3. RATIFICATION. — In order to constitute one a wrong-doer by ratification, the original act must have been done, or intended to be done, in his interest; otherwise, the *animus* of the wrong-doer cannot be imputed to him. *Dillingham* v. *Russell*, 753.

TRESPASS.

See EXECUTIONS, 3–7; RAILROAD COMPANIES, 15.

TRIAL.

1. Charge not applicable to nor supported by any evidence should not be given. *Cotulla* v. *Kerr*, 819.
2. INSTRUCTIONS. — A charge should not be given when there is not sufficient evidence to fairly raise an issue of fact to which it relates, because to give it induces the jury to believe that, in the opinion of the court, there is such evidence. *Missouri P. R'y Co.* v. *Platzer*, 771.
3. INSTRUCTIONS. — WHERE EVIDENCE IS CONFLICTING, the jury should not be instructed that the verdict "must be for the defendant." *Brownfield* v. *Hughes*, 667.
4. ACTION SHOULD NOT BE DISMISSED although a cost bond may not have been filed within the time prescribed by statute, if it is tendered before the case is actually dismissed, and an affidavit of inability to give security for costs will supply the place of a cost bond. *Missouri Pacific R'y Co* v. *Richmond*, 794.

See VERDICT.

TRUSTS AND TRUSTEES.

1. TO CONSTITUE AN EXPRESS TRUST, there must be either an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created. *Beaver* v. *Beaver*, 531.
2. TRUST CANNOT BE IMPLIED FROM THE MERE DEPOSITING OF MONEYS IN A BANK by one person in the name of another. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; CHARITABLE USES; CORPORATIONS, 5; EXECUTORS AND ADMINISTRATORS, 2, 3; MARRIED WOMEN, 2.

VENDOR AND VENDEE.

See LIS PENDENS.

VERDICT.

1. VERDICT, THOUGH NOT ALTOGETHER CERTAIN, WILL BE UPHELD when its meaning can be made manifest beyond doubt by reference to the entire record. *Gulf etc. R'y Co.* v. *James*, 743.
2. VALIDITY OF VERDICT IS NOT IMPAIRED simply because it is capricious and inconsistent; that fact alone will not authorize reversal when there is nothing else in the record tending to show misconduct. *Id.*

WAGERS.

See CONTRACTS, 6, 7.

WARRANT OF ATTORNEY.

See POWER OF ATTORNEY.

WATERCOURSES.

1. TO DETERMINE EFFECT AND ACTION OF WATER WHEN OBSTRUCTED OR PONDED in running streams, actual tests by observation and experience afford the most satisfactory testimony, and are controlling when brought in conflict with theoretical and instrumental measurements, however accurately and carefully taken. *Turner* v. *Hart*, 243.

2. WHEN PRESCRIPTIVE RIGHT TO FLOW LANDS OF ANOTHER IS CLAIMED, THE BURDEN OF PROOF is on the claimant to show that he has, for fifteen years at least, each year flowed the land to the height complained of, and that such use of the land has been adverse, uninterrupted, peaceable, open, and notorious. *Id.*

See INJUNCTIONS, 1, 2.

WILLS.

1. OPINIONS OF THE ATTESTING WITNESSES OF A WILL RESPECTING THE SANITY OF THE TESTATOR, formed at the time, are competent evidence; but it is otherwise with their opinions formed either before or afterwards. *Williams* v. *Spencer*, 206.

2. PROVISION IN WILL FOR AFTER-BORN CHILD. — A devise by a testator of his real estate to his wife for life, and after her death, to the heirs of her body begotten, is not a provision in the will for a child born to him after its execution, within the meaning of a statute which provides that "if the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked, unless provision shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received." *Rhodes* v. *Weldy*, 584.

3. AMBIGUOUS WORDS AND PHRASES, CONSTRUCTION OF. — Where the same word or phrase is used more than once in the same act in relation to the same subject-matter, and looking to the same general purpose, if in one connection the meaning is clear, and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former. *Id.*

4. A WILL PRODUCES AN EQUITABLE CONVERSION OF REAL ESTATE INTO PERSONALTY when it devises such real estate to the executors, and gives them a power of sale for the purpose of disposing of the proceeds among designated beneficiaries. *Greenland* v. *Waddell*, 400.

5. ELECTION. — PERSONS BENEFITED BY THE EQUITABLE CONVERSION OF REAL ESTATE INTO PERSONALTY BY WILL may elect to have a reconversion into realty, and take it as land, rather than the proceeds of it. *Id.*

6. EQUITABLE CONVERSION IS THAT CHANGE IN PROPERTY by which, for certain purposes, real estate is considered as personal, and personal as real, and transmissible and descendible as such, and there must be an absolute intention and direction that the conversion is to be made, in order to create it; but it is not essential that an express declaration to that effect be made in the instrument; it may arise by necessary implication from the nature of the instrument or the language employed. *Haward* v. *Peavey*, 120.

7. EQUITABLE CONVERSION CAN ONLY TAKE PLACE when the property remains unchanged in form, from a clear and imperative direction to convert it.

If this is left to the option, direction, or choice of trustees or others, no equitable conversion will take place. *Id.*

8. EQUITABLE CONVERSION. — Where a will provides that land may be sold under certain conditions, and gives executors power to sell, and, in case of sale, limits the possible purchasers to certain persons, unless the sale is actually made under the power, no equitable conversion takes place, because there is no absolute requirement in the will that the sale shall take place. *Id.*

9. DEVISE VOID FOR UNCERTAINTY. — A provision in a will requiring the executor to purchase, at a price not exceeding $——, a tract of land at or near the residence of certain persons named, at a certain town, for a cattle pasture, the free and exclusive use of which said persons shall have during their lifetime and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter, is void for vagueness and uncertainty. *Estate of Traylor*, 17.

10. PERPETUITIES. — A will devising and bequeathing property to executors, with power to sell the same, and pay the income to Mrs. B. during the joint lives of herself and husband, and in case Mrs. B. should die before her husband, leaving living issue, then to pay such income towards the support of any child or children she may leave, until the youngest reaches twenty-one years of age, to pay all of such property that may be left to him or them, and if none of such children attains twenty-one years of age, then to pay said property to testator's brother, creates a perpetuity forbidden by that provision of the Revised Statutes of New York declaring that the ownership of personal property shall not be suspended for a longer period than two lives in being at the death of the testator. *Greenland* v. *Waddell*, 400.

See REMAINDERS, 1–5.

WRIT OF POSSESSION.

See LANDLORD AND TENANT, 6.